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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

PHILADELPHIA ELECTRIC COMPANY,
*Petitioner*

*v.*

BLACK GRIEVANCE COMMITTEE,
*Respondent*

and

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

and

INDEPENDENT GROUP ASSOCIATION,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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## Questions Presented for Review

1. Where an employer permits one non-exclusive labor organization to process individual grievances on behalf of its members, does Section 8(a)(1) of the National Labor Relations Act require the employer to recognize another labor organization for the purpose of processing individual grievances for its members, a question reserved by the Court in *Radio Officers Union v. NLRB*, 347 U.S. 17, 47 (1954), in view of an employer's duty under the Act to deal with a labor organization only when it is the exclusive representative and the Supreme Court's approval of "members only" contracts with non-exclusive representatives?

2. Where the National Labor Relations Board found that disparate treatment of two non-exclusive labor organizations is not a prima facie violation of Section 8(a)(1) of the National Labor Relations Act, may a court of appeals, without disturbing the Board's factual findings and without finding that the Board's legal judgment was irrational, arbitrary or an abuse of discretion, disagree with the Board's interpretation of Section 7 and conclude that the employer violated Section 8(a)(1) of the Act?

## Corporate Designation

Petitioner Philadelphia Electric Company has no parent company or subsidiaries, excluding wholly owned subsidiaries. Through a wholly owned subsidiary, Petitioner is affiliated with Franklin Town Corp.

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## PETITION FOR WRIT OF CERTIORARI

### Reports of Opinions

The Third Circuit's opinion is reported at 749 F.2d 1072 (3d Cir. 1984); the NLRB's decision and order is reported at 268 NLRB 830 (1982).

## Statement of Jurisdiction

This is a petition for a writ of certiorari to a case in the U.S. Court of Appeals for the Third Circuit. Judgment was entered by the Court of Appeals on January 18, 1985. On March 8, 1985, the Court of Appeals entered an order recalling and staying its mandate. This Court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

## Statutory Provisions

This case involves Sections 7, 8(a)(1), (2), (3) and 9(a) of the National Labor Relations Act:

Section 7: Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this Title.

29 U.S.C. §157 (1982).

Section 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this Title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *provided* that subject to rules and regulations made and published by the Board pursuant to Section 156 of this Title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. §158(a)(1), (2), (3) (1982).

Section 9(a): Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining and in respect to rates of pay, wages, hours of employment or other conditions of employment: *provided*, that any individual employee or any group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a

> collective bargaining contract or agreement then in effect: *provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. §159(a) (1982).

The following section of the Act and regulations of the National Labor Relations Board are also cited:

Section 9(c)(1): Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in Section 9(a) . . . the Board shall [investigate, provide a hearing and conduct an election].

29 U.S.C. §159(c)(1) (1982).

National Labor Relations Board Statements of Procedure, Series 8, as amended, §101.18:

> The evidence of representation submitted by the petitioning labor organization . . . is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of

an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.

**Statement of the Case**

This is a petition for a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Third Circuit setting aside an order of the National Labor Relations Board ("NLRB" or "Board") and remanding the matter to the Board for proceedings consistent with its opinion. (A. 52). The NLRB held that it was not a violation of Section 8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(a)(1) (1982), for Petitioner Philadelphia Electric Company ("PECO") to permit one labor organization, the Independent Group Association, ("IGA"), to represent its members in an individual grievance procedure while denying the same privilege to another labor organization, the Black Grievance Committee ("BGC")[1]. The BGC filed a petition for review with the Third Circuit, invoking the Court's jurisdiction under 29 U.S.C. §160(f). The Court of Appeals disagreed with the Board's interpretation of Section 7 of the Act and held that PECO's disparate treatment of the two labor organizations was a violation of Section 8(a)(1).

The Board found that neither labor organization is the exclusive bargaining representative for Petitioner's

1. The complaint issued by the Board's General Counsel was based on a charge filed by a representative of the BGC that PECO's recognition of the IGA violated Sections 8(a)(1) and (2) of the Act. The complaint alleged that PECO met with representatives of the IGA to discuss grievances and other terms and conditions of employment but refused to meet with the BGC, in violation of 8(a)(1). (A. 17-18). The complaint did not allege that PECO violated 8(a)(2). The complaint also alleged PECO violated 8(a)(3) by discharging a BGC member. That portion of the ALJ's decision dismissing the 8(a)(3) claim was not excepted to by the General Counsel and was not before the NLRB or the Court of Appeals. (A. 14, n.3)

employees, all employees of Petitioner have access to a grievance procedure, all grievance procedures culminate in a final decision by the vice president of personnel and industrial relations, all employees may select a representative of their own choosing to assist them at any step of the Company's grievance procedures and that class or group grievances may be presented by any labor organization or employee representative. (A. 20, 21-23, 25, 42). On the basis of these facts, the Board found that PECO did not discriminate against its employees on the basis of labor organization membership, did not interfere with the rights of its employees to join or support a labor organization and has not impeded the Black Grievance Committee in any of its activities, including its organizing activities. (A. 40-44).

The Board held that on these facts the recognition of the IGA as an individual grievance representative for its members and the refusal to accord the same status to the BGC was not a violation of Section 8(a)(1). (A. 44).

The Court of Appeals noted it was bound by the Board's factual findings if supported by substantial evidence in the record as a whole, but that "the legal precepts applied by the Board to those factual findings are not entitled to such deference. Instead this court bears the ultimate responsibility to decide and enforce the applicable legal standards. See *e.g., Graham Architectural Products v. NLRB,* 697 F.2d 534, 537 (3d Cir. 1983)." (A. 6). Applying this standard of review to the Board's decision, the Court did not upset the Board's factual findings but concluded that the Board "erred in not recognizing that the protection of Section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity." (A. 9). (Emphasis in original). Relying on the ALJ's comment in his decision that "it is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC," (A. 41) the

Court of Appeals held that PECO violated Section 8(a)(1): "Because PECO's privileged treatment of the IGA encourages membership in that group and discourages membership in other groups, including the BGC, PECO has interferred with and coerced employee choice in self-organization, and in forming, joining, and assisting a labor organization." (A. 10).

The Court's decision raises two important issues of federal labor law under the National Labor Relations Act which have not been resolved by this Court. First, does an employer have an obligation under Section 8(a)(1) to treat two or more non-exclusive labor organizations equally? The Court of Appeals noted that it was faced with this novel issue which was expressly reserved by the Supreme Court in *Radio Officers Union v. NLRB*, 347 U.S. 17, 47 (1954). (A. 10-11). Second, what is the role of the courts of appeals in reviewing the legal judgments of the NLRB that certain conduct is not a prima facie violation of the National Labor Relations Act? The courts of appeals have applied conflicting standards in reviewing Board orders to dismiss unfair labor practice complaints. The Third Circuit suggested in this case that the Board's legal judgment is not entitled to deference and that it is the responsibility of the courts to decide and enforce the applicable legal standards. *Compare, Prill v. NLRB*, ____F.2d ____(No. 84-1064, D.C. Cir. February 26, 1985) (court will not defer to Board's judgment where, because of erroneous view of law, Board fails to exercise discretion authorized by Congress); *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978) *cert. den.* 439 U.S. 981 (1978) (affirming Board order where "rational"); *International Ladies Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (same). *See also, Linden Lumber Division, Summer & Co. v. NLRB*, 419 U.S. 301, 309 (1975) ("We cannot say that the Board's decision [that the company did not violate 8(a)(5)] was arbitrary, or capricious or an abuse of discretion.")

As the Court of Appeals noted, the relevant facts in this case are not in dispute. Petitioner Philadelphia Electric Company is a public utility engaged in the production and distribution of gas, electricity and steam to 3.7 million people in the states of Pennsylvania and Maryland. The Company employs approximately 10,000 employees. (A. 19). A group of employees at the Company's Chester generating station are represented for purposes of collective bargaining by the International Brotherhood of Electrical Workers. No labor organization is, or has been, the exclusive representative of all PECO's employees within the meaning of Section 9(a) of the National Labor Relations Act. (A. 20). There are however a number of employees associations and groups within the Company which are organized by employees for different purposes. For example, there is an annuitant group for retired employees, a linemen association and a Catholic association. (A. 23-24). This litigation focused on the question whether PECO has an obligation under the National Labor Relations Act to treat two of those groups, the IGA and the BGC, equally. Specifically, the Company has refused to create a procedure for the BGC to present individual grievances in the same manner as the IGA, and when an employee is accompanied by a BGC representative in the individual grievance procedure, PECO does not acknowledge the representative as an agent of the BGC.

Any employee at PECO may file a grievance and all employees, regardless of their employee-group affiliation, process their grievances through immediate supervisors and then through higher steps of supervision within their own department. Any employee presenting a grievance may be accompanied by another employee of the Company to represent him during this part of the grievance procedure. The Board found that it was uncontradicted that PECO permits members of the BGC to represent employees in the processing of grievances. (A. 21-22).

After the grievance is processed through his immediate supervisors, the employee has two ways of having his grievance presented to PECO's personnel and industrial relations department. (A. 22). Members of the IGA may have their grievances presented in writing by representatives of the IGA in periodic meetings between the IGA and PECO's personnel and industrial relations department. The grievance is investigated under the vice president's direction and a written answer is issued by the vice president. In the event the grievance is denied, there is a fourth-step appeal. A meeting is held between the aggrieved employee, an IGA representative, supervisors from the employee's department and the manager of personnel and industrial relations, who is responsible to and reports to the vice president. The manager mediates the dispute and determines whether any facts were overlooked during the third step. The manager recommends a disposition to the vice president and the vice president then issues an answer, if he has changed his initial decision. The decision by the vice president is final and there is no appeal to any form of arbitration. This is the IGA grievance procedure. (A. 22).

Employees who are not members of the IGA and members who do not wish to follow the IGA procedure follow a different route after exhausting the departmental remedies. They first meet directly with various representatives of the personnel and industrial relations department, in person, and then if they wish, with the vice president. As is true at the departmental level of the grievance procedure, the employee may be represented by another employee of his choice at each of these steps. The Board found that members of the BGC have represented employees in grievance meetings with various personnel department representatives, including the vice president. (A. 22). After the grievance is investigated, PECO generally does not respond to the individual grievance in writing because the aggrieved employee is permitted to present his grievance personally to the vice

president and receive a personal answer. As is true with the IGA procedure, the decision by the vice president is final.

These are the two procedures for handling individual grievances. There is another method for handling group grievances. When a group of employees have a common grievance, PECO will meet with the employees en masse or with representatives of the group, including the BGC, for the purpose of resolving the group grievance. (A. 23, 25).

The NLRB inferred from these facts that PECO's refusal to recognize the BGC as a grievance representative for its members did not violate Section 8(a)(1). The Court of Appeals disagreed with that inference because the two individual grievance procedures available to PECO employees to resolve disputes "seemingly accord the IGA and its members a privileged status in the presentation and resolution of individual grievances," (A. 5), and therefore PECO unlawfully coerced employees to either join the privileged group or forego group representation for individual grievances. (A. 13).

## Argument

### I. The Court of Appeals' Resolution Of An Important But Unsettled Question of Federal Labor Law Is Contrary To The Purposes Of The NLRA And Previous Decisions Of The Supreme Court.

Section 7 of the National Labor Relations Act extends to employees the right to organize and the right to form, join or assist labor organizations. 29 U.S.C. §157 (1982). If at least 30 percent of the employees in a unit support a labor organization, they may petition the NLRB to conduct a representation election to determine whether a majority of the employees wish to be represented by that group. 29 U.S.C. §159 (c); National Labor Relations Board Statements of Procedure, Series 8, as amended, §101.18 (a). If the labor organization enjoys the support of a majority of the employees in the unit, the employer may, but is not required to, voluntarily recognize the organization as the employees' representative without an election. *Linden Lumber Division, Summer & Company v. NLRB*, 419 U.S. 301 (1974). Under Section 9 (a) of the Act, once a majority of employees designate or select a representative, that representative is the exclusive bargaining agent for all employees in the unit. 29 U.S.C. §159 (a). An employer is obligated under Sections 9 (a) and 8 (a) (5) of the Act to deal only with that representative: "The Act carries the clear implication that employers shall not interfere with the right of collective bargaining by bargaining with individuals or minority groups on their own behalf, after representatives have been picked by the majority to represent all. . ." *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 n.2 (1944).

A different set of rules comes into play where there is no exclusive representative. An employer is not required to deal with a group which has not attained exclusive status under Section 9 (a). *NLRB v. A. J. Tower*

*Company*, 329 U.S. 324, 333 (1946). The employer may, however, recognize a minority labor organization as the representative for its members only without violating the Act. *Consolidated Edison Company v. NLRB*, 305 U.S. 197 (1938). These "members only" contracts are enforceable in the U.S. district courts under Section 301 of the Act. *Retail Clerks Local 128 v. Lion Dry Goods*, 369 U.S. 17 (1962). Under Section 8 (a) (2) of the Act an employer may not dominate or interfere with the formation or administration of a labor organization. 29 U.S.C. §158 (a) (2). The Board has held under Section 8 (a) (2) that an employer must refrain from dealing with one labor organization after a valid representation petition is filed with the Board by a competing group. *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB 955 (1982). And under Section 8 (a) (3), an employer may not discriminate against employees to encourage or discourage labor organization membership. 29 U.S.C. §158 (a) (3).

This case raises a novel question of federal labor law which these established contours of the Act do not answer: May an employer, faced with two or more employee groups, none of which is the exclusive representative, lawfully under Section 8 (a) (1) of the Act grant one group certain privileges it does not grant another? This issue was expressly reserved by the Court in *Radio Officers Union v. NLRB*, 347 U.S. 17, 47 (1954): "We express no opinion as to the legality of disparate payments [to employees based on union membership] where the union is not the exclusive bargaining agent." The Court of Appeals for the Third Circuit, the first court of appeals to confront the issue directly, answered this question by holding that an employer unlawfully interferes with employees' Section 7 rights if he grants a privilege to one non-exclusive employee group and does not extend the same privilege to a second non-exclusive group. To avoid interfering with employees' rights under Section 7 to self-organization and to join, form or assist

labor organizations, an unorganized employer must treat all employee groups the same. The Court's ruling cannot be justified under previous decisions of this Court, and expands Section 8 (a) (1) to prohibit conduct which Congress, in the absence of discrimination or a Section 8 (a) (2) or 8 (a) (5) violation, intended to permit. The Court's rationale, if permitted to stand, will substantially change the way non-union employers and employees deal with one another.

The disagreement between the Court of Appeals and Board centers on the "leverage" or "privileged status" of the IGA. The Court inferred that this status encouraged membership in the IGA, discouraged it in the BGC (and presumably other groups) and, therefore, PECO unlawfully interfered with the Section 7 rights of non-IGA members. (A. 10). The Board on the other hand noted that while this status "may minimally encourage membership in the IGA" PECO did not interfere with employees' Section 7 rights because there was no evidence of discrimination and, at least where neither group was competing for exclusive representation, PECO was not obligated under Section 8 (a) (1) to remain neutral with respect to the two groups. *Bruckner Nursing Home*, 262 NLRB 955 (1982); *Midwest Piping Co.*, 63 NLRB 1060 (1945). (A. 42-44). The Board's view is more consistent with the purposes of the Act.

Standing alone, an act which may encourage or discourage union membership is not an unfair labor practice. *NLRB v. Brown*, 380 U.S. 278, 283-287 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 308-311 (1965); *NLRB v. Insurance Agents Union*, 361 U.S. 477, 497-98 (1960). For example, unorganized employers commonly engage in conduct designed to inhibit employees' organizational attempts. A conscientious employer will grant wage and benefit increases and make frequent improvements in working conditions to maintain his non-union status. These acts have the effect of encouraging "no union". But unless these acts are de-

signed to interfere with an on-going organizational attempt or discriminate against employees because of their protected activity, there is no violation of the Act. Neither the Board nor the Supreme Court has equated acts which may result in encouragement or discouragement with unlawful interference under Section 8(a)(1). *See, Radio Officers Union v. NLRB*, 347 U.S. 17, 41-43 (1954) (8(a)(3) violation); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945) (upholding Board's finding that broad no soliciation rule and discharge of employee for union solicitation violated sections 8(a)(1) and (3).)

According to the Court of Appeals, if an employer does not deal with all budding labor organizations in the same manner, he unlawfully interferes with a particular employee's right vis-a-vis the employee's preferred group. It is well established that before a labor organization obtains exclusive status, the employer is free to ignore it. *NLRB v. A. J. Tower Company*, 329 U.S. 324, 333 (1946). Although that action may discourage membership in the group, it is not a violation of the Act unless the group enjoys exclusive status under Section 9 (a). Conversely, an employer may choose to recognize the group on a members only basis. *Consolidated Edison Company v. NLRB*, 305 U.S. 197 (1938). By definition, the arrangement bestows certain benefits and costs on members of the group which are not necessarily extended to other employees. Recognition may encourage or discourage membership in the group, depending on the attractiveness of the members only arrangement. Yet recognition of the members only group is not a violation of the Act unless the employer has assisted or dominated the group in violation of Section 8 (a) (2), for example, by prematurely recognizing the minority group as the exclusive representative. *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731, 736 (1961).

The Court relied on these principles in *NLRB v. Cabot Carbon Company*, 360 U.S. 203, 217 (1959), when it addressed the relationship between Sections 8

(a) (2) and 9 (a) of the Act: "The amendment to Section 9 (a) does not say that an employer may form or maintain an employee committee for the purpose of dealing with the employer, on behalf of employees, concerning grievances." Rather, Section 9 (a) guarantees employees the right to present their own grievances, but not to be represented by others before management except by formally designating a bargaining representative. *See also, Emporium Capwell Company v. Western Addition Community Organization*, 420 U.S. 50, 61 n.12 (1975); Note *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8 (a) (2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662, 1670 n.51 (1983).

Justice Douglas reiterated this point in dissenting from the Court's approval of a broad order of the Board to disestablish the minority union in *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961): "We have indicated over and again that absent an exclusive agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members. In *Virginian Railway Company v. System Federation No. 40*, 300 U.S. 515, 549 n.6 (1937), the Court quoted with approval a concession that 'if the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules or working conditions.' " 366 U.S. at 741. As Justice Douglas noted, although *Virginian Railway* was decided under the Railway Labor Act, it has been followed under the National Labor Relations Act. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. at 684.

The Court of Appeals' decision adds to these established rules of conduct a significant exception: If two or more groups surface in the plant, they must be treated equally. This additional duty cannot be justified under the Act. Where, as in this case, the employer has not discriminated against employees on the basis of group

activities, has not interfered with the rights of employees to join, form or assist either group, and there is no allegation that the employer assisted or dominated one of the groups in violation of Section 8(a)(2), the only purpose of this requirement can be to extend to the one group the "leverage" it perceives another group enjoys. But an employer is not obligated under Sections 7 and 8(a)(1) to ensure that two employee groups enjoy the same leverage or power. *See Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 419 (1982); *American Shipbuilding Company v. NLRB*, 380 U.S. 300, 316-318 (1965).

The Court of Appeals has created a new duty under 8(a)(1) to recognize and deal with minority labor organizations, which will also adversely affect experimentation with alternate forms of employee organizing and employee representation. To address worker dissatisfaction, declining productivity and increased absenteeism, both union and non-union employers have experimented with different models of labor relations. Employee associations and quality of work life programs, for example, have blossomed in the last 15 years. *See generally*, Walton, *Work Innovations in the U.S.*, Harv. Bus. Rev., July and August 1979, at 88. Oftentimes these groups are formed at the suggestion of the employer, sometimes they are formed, as at PECO, on the initiative of individual employees. The Act already has an effective mechanism for regulating an employer's treatment of these groups and their members, Sections 8(a)(2) and 8(a)(3). *See e.g.*, Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2)*, 96 Harv. L. Rev. 1662, 1678-1682 (1983); Schmidmann & Keller, *Employee Participation Plans as a Section 8(a)(2) Violation*, 35 Lab. L.J. 772 (1984).

When an employer's conduct does not amount to unlawful assistance or domination and the employer has not discriminated against employees on the basis of labor organization membership, the Act should not be construed to handcuff an employer in his efforts to provide

employees with methods of representation short of exclusive representation under Section 9(a). Both employer and employees ought to have the freedom to experiment with different forms of representation and means of communication depending on their particular circumstances. *Note, New Standards for Domination and Support under Section 8(a)(2)*, 82 Yale L.J. 510 (1973) (arguing that where employees are uninterested in developing traditional union representation and where the employer acts in good faith, the law should provide for labor organizations which fill the need for more innovative labor-management structures).

This interest in alternative forms of employee groups and labor organizations is not limited to management. In 1980, unions represented just over 20% of the workforce, compared to 30% in 1965 and 35% in 1954. Weiler, *Promises To Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769 (1983). (Hereafter "Weiler"). This decline in union membership is no doubt due in part to unions' increasing difficulty in winning representation elections. In the 1940's, unions won approximately 80% of representation elections. That success rate steadily declined in each succeeding decade. In 1980 unions won 48% of representation elections. Weiler, at 1776. The result of these trends is that the number of employees successfully organized each year has dropped from 750,000 to fewer than 200,000. *Id.*

To combat this steady erosion of its prominent position in the workplace and the economy, organized labor has proposed the formation of alternative forms of employee groups and labor organizations. The AFL-CIO Committee on the Evolution of Work recently recommended to the AFL-CIO Executive Council that unions experiment with new organization and membership concepts in order to attract new members. *Report of AFL-CIO Committee on the Evolution of Work and the Changing Situation of Workers and Their Unions*, reprinted in

37 *Daily Labor Report* (BNA) February 25, 1985, at D-1. This Report recommended that "unions must develop and put into effect multiple models for representing workers tailored to the needs and concerns of different groups . . . collective bargaining is not, and should not be confined by any rigid and narrow formula; the bargaining process is shaped by the times, the circumstances and the interplay between particular employers and employees." *Id* at D-4. *See also,* Editorial, "Bal Harbour Blues" *Wall Street Journal,* February 25, 1985, at 30. (noting that union leaders were recommending employee associations to help labor improve its organizing efforts).

This national interest in trying alternative forms of employee representation short of exclusive status under Section 9(a) of the Act will not get very far if employers are required to deal with each group in the same manner. An employer will be reluctant to deal with an employee group, such as the BGC or the IGA, if he knows that next week when the Teamsters inform him that it speaks for a group of employees, he will be required to extend to the Teamsters group whatever benefits he may have conferred on another group. The easiest and least dangerous route for an employer who is faced with this obligation is to ignore all employee groups, wait for one of them to obtain the requisite 30% support to file a representation petition with the NLRB, and then campaign to defeat the petitioning union. *See,* Weiler at 1776-1786 (arguing that protracted campaign periods and anti-union campaigns adversely affect election results). Conversely, an outside union seeking recognition on a limited basis may refrain from doing so if every group which appears at an employer's doorstep is entitled to the same treatment. Thus, employees are left with exclusive representation or none at all.

These results hardly encourage the goals of collective bargaining and self-organization contemplated by the Act. The Board previously has shown an interest in

balancing the often conflicting rights of employees to self-organization, *e.g., Bruckner Nursing Home*, 262 NLRB 955 (1982), and it has done so in this case. The Court of Appeals upset that balance by imposing on non-union employers its own view of equality under the Act. This Court has recognized that the Act does not mandate a static form of labor relations. If the Act is to be adopted to new methods of employee representation and employee organizing, the NLRB should be permitted to intepret that law in a way which promotes, not discourages, that development. This Court should review this case to resolve this important question of federal labor law.

## II. The Supreme Court Should Resolve The Conflict Over The Standard of Review To Be Applied To NLRB Legal Judgments Under The NLRA

This case raises the question of what standard of review should guide a court of appeals in reviewing an NLRB order dismissing an unfair labor practice complaint where the court does not disturb the Board's factual findings. This Court suggested in *Linden Lumber Division, Summer & Company v. NLRB*, 419 U.S. 301 (1974) that a Board decision to dismiss an unfair labor practice complaint should not be disturbed unless it is arbitrary, capricious or an abuse of discretion. The circuit courts in turn have applied inconsistent standards in reviewing the legal judgments of the Board and the degree of deference varies from case to case. *Compare, Black Grievance Committee v. NLRB*, 749 F.2d 1072 (3d Cir. 1984) *with Prill v. NLRB*, ____ F.2d ____, (No. 84-1065 February 26, 1985) (court will not defer to Board's judgment where, because of erroneous view of law, Board fails to exercise discretion authorized by Congress) and *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978), *cert denied* 439 U.S. 981 (1978) and *International Ladies Garment Workers Un-*

*ion v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) (affirming Board's legal judgment of no unfair labor practice where that judgment had a "rational basis"). None, however, has gone as far as the Third Circuit and concluded that the Board's legal judgments are not entitled to deference and that the courts of appeals bear the ultimate responsibility to decide the applicable legal standard. In articulating and applying this standard, the Third Circuit completely misapprehended its role in reviewing the legal judgments of the Board.

When reviewing NLRB orders, it is clear that a court is bound by the Board's factual findings as long as they are supported by substantial evidence in the record as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); 29 U.S.C. §160 (f). The standard for reviewing the Board's legal conclusions drawn from those facts is less clear. In *NLRB v. Truckdrivers*, 353 U.S. 87, 96 (1957), the Court noted that the Board's legal judgments, because they are the result of balancing conflicting legitimate interests, are subject to limited judicial review. The Court frequently invokes this principle to uphold Board determinations in a variety of contexts under the Act. *e.g., Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982) (multi-employer bargaining); *American Broadcasting Companies v. Writers Guild of America*, 437 U.S. 411 (1978) (union discipline); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (no solicitation rules). In *NLRB v. Brown*, 380 U.S. 278, 290-91 (1965), however, the Court said that the phrase "limited judicial review" does not mean that the balance struck by the Board is immune from judicial examination and reversal in proper cases. The Court then cited a number of cases where it had set aside Board orders of unfair labor practices. 380 U.S. at 291, n.5. This confusion over what standard of review the courts should apply to NLRB decisions involving questions of law, as distinguished from questions of fact, prompted one commentator to write: "The Supreme Court is of course re-

sponsible for establishing the proper doctrine and attitudes concerning the scope of review of labor board decisions involving questions of law or mixed fact and law. The opinions of the Court, however, do not establish a coherent view of the scope of that review." Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup. Ct. Rev. 53, 71-72.

Although this Court perhaps has not clearly articulated the standard of review the courts of appeals are to apply in reviewing the legal judgments of the Board, it is clear that those judgments are entitled to considerable deference in the court of appeals. In upholding the Board's construction of Section 7 of the Act to extend to employees a right to union representation during investigatory interviews, the Court has noted that it is the province of the Board, not the courts, to apply Section 7 in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264 (1975). The Court relied on the same principle in affirming the Board's judgment that an employer did not violate Section 8 (a) (5) solely because it refused to accept evidence of a union's majority status other than through the results of a Board election: ". . . We cannot say that the Board's decision that the union should go forward and ask for an election on the employer's refusal to recognize the authorization cards was arbitrary or capricious or an abuse of discretion." *Linden Lumber Division, Summer and Company v. NLRB*, 419 U.S. 301, 309-310 (1974). This principle was recently reaffirmed by the Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742 (1983):

> Of course, in light of the Board's special competence in applying the general provisions of the Act to the complexities of industrial life, its interpretations of the Act are entitled to deference, even where, as here, its position has not been entirely consistent."

*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 264-267 (1975); *NLRB v. Seven-Up Company*, 344 U.S. 344, 347-349 (1953). And here, were only the literal language of Sections 8 (a) (1) and 8 (a) (4) to be considered, we would be inclined to uphold the Board, because its present construction of the statute is not irrational.

Judicial deference to the Board's interpretation of the statute is particularly justified where the Board has ruled that the established facts do not show a prima facie violation of the Act. This judgment, although a final order of the Board under 29 U.S.C. §160 (f), is not fundamentally different from a Board decision not to issue an unfair labor practice complaint. The Board's refusal to issue a complaint is a matter solely within its administrative discretion and is not subject to review by the courts. *e.g., Vaca v. Sipes*, 386 U.S. 171, 182 (1967). *See also, Heckler v. Chaney*, ____ U.S. ____, 53 U.S.L.W. 4385 (U.S. March 20, 1985). (federal agency's decision not to take enforcement action not subject to judicial-review under the Administrative Procedure Act). When the Board decides to dismiss the complaint because a prima facie violation of the Act was not shown, it has made a judicial determination that the general counsel has not proved his case. Where the case involves an unresolved legal issue and a novel theory of liability, implicit in the decision is an administrative judgment that the Act does not and should not reach the conduct complained of. Provided that judgment is rational, or not an abuse of discretion, it should not be disturbed by a court.

Given the lack of instructions from this Court, the Third Circuit articulated and applied a scope of review which affords little deference to the Board's legal judgment and puts the court in the role of the Board as the body responsible for developing national labor policy. This broad standard permits a court, under the guise of limited judicial review, to upset the balance struck by the

Board simply because the court disagrees with the Board's interpretation of the relevant sections of the statute. This a court may not do. *Charles D. Bonanno Linen Service, Inc. v. NLRB,* 454 U.S. 404, 419 (1982); *NLRB v. Local 103, International Association of Bridge Workers,* 434 U.S. 335, 350 (1978).

To preserve the primary role of the NLRB in applying the Act to new industrial practices and to give some guidance to the courts of appeals in reviewing the legal judgments of the Board, the Court is respectfully urged to accept this case for review.

## Conclusion

It is respectfully requested that the Court grant the petition for a writ of certiorari to consider these two important but undecided questions of federal labor law: 1. Does an employer have an obligation to treat two or more non-exclusive labor organizations equally, a question left open in *Radio Officers v. NLRB;* and 2. May a court of appeals reverse the NLRB's legal judgment that the facts do not establish a prima facie violation of the Act where the Court has not concluded that the Board's decision was irrational or an abuse of discretion?

Respectfully submitted,

BY:_____

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## CERTIFICATE OF SERVICE

H. Thomas Felix, II, Esquire, as counsel of record for Petitioner, Philadelphia Electric Company, hereby certifies that on April 16, 1985, he served, pursuant to Supreme Court Rule 28.3, by first-class mail, postage prepaid, three copies of Philadelphia Electric Company's Petition for Writ of Certiorari on the following persons:

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All parties required to be served by Supreme Court Rule 28 have been served.

H. THOMAS FELIX, II, ESQUIRE

DATED: April 16, 1985

# APPENDIX

**BLACK GRIEVANCE COMMITTEE, Petitioner,**

**v.**

**NATIONAL LABOR RELATIONS BOARD, Respondent,**

**and**

**Philadelphia Electric Company, Intervenor,**

**and**

**Independent Group Association, Intervenor.**
**No. 84-3138.**

United States Court of Appeals,
Third Circuit.

Argued Nov. 29, 1984.
Decided Dec. 13, 1984.

On petition for review of final order of the National Labor Relations Board dismissing unfair labor practice complaint against employer, the Court of Appeals, James Hunter, III, Circuit Judge, held that employer's privileged treatment accorded to one nonmajority group over another non-majority group, thereby encouraging membership in the former while discouraging it in the latter, constituted unlawful interference with employees' rights to band together in group of their choice, regardless of whether either organization sought exclusive representative status.

Order set aside; matter remanded.

**1. Labor Relations [KEY] 367**

Neither direct proof of interference with protected rights nor antiunion animus is necessary to sustain a violation of the National Labor Relations Act so long as

employer's activity would tend to interfere with, coerce, or restrain a reasonable employee. National Labor Relations Act, §8(a)(1), 29 U.S.C.A. § 158(a)(1).

**2. Labor Relations [KEY] 281**

Activities of nonmajority employee group in banding together to present their grievances to employer were protected by the National Labor Relations Act. National Labor Relations Act, §7, 29 U.S.C.A. §157.

**3. Labor Relations [KEY] 380**

Employer's privileged treatment accorded to one nonmajority group over another nonmajority group, thereby encouraging membership in the former while discouraging it in the latter, constituted unlawful interference with employees' rights to band together in group of their choice, regardless of whether either organization sought exclusive representative status. National Labor Relations Act, §§7, 8(a)(1), 29 U.S.C.A. §§157, 158(a)(1).

**4. Labor Relations [KEY] 380**

If nonmajority employee group proved its allegation that determining factor in employer's decision not to accord it equal privileges to another nonmajority employee group was racial composition of former group's leadership and membership, employer would have committed an independent violation of the National Labor Relations Act for which no business justification would exist. National Labor Relations Act, § 8(a)(1), 29 U.S.C.A. §158(a)(1).

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Robert G. Kelly, Jr., Brenda M. Flock, Kelly, Harrington, McLaughlin & Foster, Philadelphia, Pa., for intervenor, Independent Group Ass'n.

Before HUNTER and WEIS, Circuit Judges, and COHEN,* District Judge.

**OPINION OF THE COURT**

JAMES HUNTER, III, Circuit Judge:

This case arises on a petition for review of a final order of the National Labor Relations Board ("NLRB" or "the Board") dismissing an unfair labor practice complaint against Intervenor, Philadelphia Electric Company ("PECO"). Petitioner, Black Grievance Committee ("BGC"), is an aggrieved person within the meaning of section 10(f) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 160(f) (1982), and jurisdiction is based on that section. Because we conclude that the Board's decision is contrary to the language and purposes of the Act, we will set aside the Board's order and remand for further proceedings consistent with our opinion.

I.

The relevant background facts in this case are undisputed[1] The Independent Group Association ("IGA") represents between 4200 and 4600 of PECO's employ-

* Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

1. As did the Administrative Law Judge ("ALJ") below, we will rely on the stipulation of facts agreed to by the parties. App. at 29-34.

ees, and has dealt with PECO on issues concerning wages, hours, and working conditions of its members for over 40 years. App. at 6. The IGA has not, however, ever been recognized or certified under the Act as the exclusive bargaining representative for PECO's employees. Nevertheless, IGA representatives meet monthly with PECO's personnel representatives, and the IGA is identified in PECO's employee handbook as the employee organization with which PECO discusses employee concerns. App. at 6. PECO has allows the IGA to use company bulletin boards and parking lots, and implemented a dues check-off procedure for IGA members in 1981. App. at 6-7.

The BGC was formed in 1968 by several black employees who believed that the IGA was unresponsive to alleged discriminatory practices on the part of PECO. App. at 9. Although the BGC is not limited to minority-group employees, it is dominated by blacks, and exists primarily to eradicate perceived discriminatory practices in the workplace. App. at 10. PECO representatives have met with BGC representatives concerning many issues, but have refused to discuss individual BGC members' grievances with BGC representatives. App. at 9. It is this refusal to meet over individual grievances that is at the heart of this case.

PECE provides a grievance procedure for all of its employees. This procedure is detailed in the Employee Handbook, and consists of three steps: 1) individual employee discussion with the immediate supervisor; 2) individual employee discussion with successively higher levels of supervision; and 3) individual employee discussion with a representative of PECO's personnel department. App. at 35. At the latter two steps, an individual may be accompanied by another employee of the company, but that employee may not act as a group representative. As a general rule, PECO issues no written responses to these grievances, and employees present their grievances orally. App. at 8.

PECO also provides, however, an alternative grievance procedure for members of the IGA. App. at 35. After the initial discussion with the immediate supervisor, an IGA member may choose to have his grievance presented in writing at one of the monthly meetings between representatives of the IGA and PECO. After the grievance is discussed at this meeting, representatives of PECO's personnel department investigate the grievance, and the vice-president in charge of personnel issues a written answer. In the event the grievance is denied, another meeting is held between the employee, an IGA representative, and the employee's supervisors, and is mediated by PECO's manager of personnel and industrial relations. The manager then recommends a disposition to the vice-president of personnel, who either reaffirms his earlier decision or issues a new answer. App. at 4.

PECO's personnel policies, therefore, seemingly accord the IGA and its members a privileged status in the presentation and resolution of individual grievances. The ALJ found that the effect of this privilege is to give IGA members greater leverage in their dealings with PECO. App. at 17. The dispute in this case arose after PECO's vice-president of personnel refused to allow the BGC and its members similar privileges. Specifically, PECO refuses to meet with BGC representatives to discuss individual grievances of BGC members, and refuses to acknowledge the BGC status of employees who accompany BGC members to grievance meetings under the procedure for non-IGA members. App. at 8. Further, it is undenied that PECO's motivation for denying the BGC equal status is PECO's desire to have all grievances formally processed through one group (*i.e.*, the IGA), and its hesitance to deal with racially segregated employee organizations. App. at 32.

After a charge was filed by a BGC representative, the Board's General Counsel issued an unfair labor practice complaint charging PECO with a violation of section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) (1982), for re-

fusing to accord the BGC equal status to the IGA in the presentation and resolution of individual grievances. App. at 57-58. After a hearing, an Administrative Law Judge dismissed the complaint, holding "[i]n my view favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks section 9(a) status." App. at 17. A three-member panel of the Board adopted the ALJ's findings and holding without opinion. 268 N.L.R.B. No. 123 (1984). Because the ALJ's opinion, as adopted by the Board, is unsupported by the language of sections 7 and 8 of the Act, 29 U.S.C. §§ 157, 158 (1982), we now set aside the Board's order.

II.

We begin our analysis by noting the standard of review appropriate in this case. The Board's factual findings must be affirmed if they are supported by substantial evidence on the record considered as a whole, 29 U.S.C. §160(e) (1982), regardless of whether we would reach a different conclusion if the matter were before us *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951). The legal precepts applied by the Board to those factual findings, however, are not entitled to such deference. Instead, this court bears the ultimate responsibility to decide and enforce the applicable legal standards. *See, e.g., Graham Architectural Products Corporation v. NLRB*, 697 F.2d 534, 537 (3d Cir. 1983).

Although we might decide differently if the matter were before us *de novo*, we find that the ALJ's factual findings concerning the privilege accorded IGA and its members because of the differences in the grievance procedures are supported by substantial evidence in the record as a whole. App. at 7 ("It is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organiza-

tional activities by the BGC."). The focus of this opinion, therefore, is on the correctness of the legal standards applied to those factual findings.

[1] In this case, the relevant legal precepts are found in the statutory language itself. Section 7 of the Act states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . . .

29 U.S.C. §157 (1982). Section 8(a)(1) of the Act states it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157. . . ." 29 U.S.C. §158(a)(1) (1982). Neither direct proof of interference with protected rights nor anti-union animus is necessary to sustain a violation of section 8(a)(1), so long as the employer's activity would tend to interfere with, coerce, or restrain a reasonable employee. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

[2] The parties agree that the activities of the BGC members in banding together to present their grievances to PECO are protected by section 7 of the Act. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (non-union employees who join together to complain about lack of heat in plant engaged in concerted activity). Indeed, the very formation of the BGC is protected by its members' rights to "self-organization" to "form, join or assist labor organizations," and to "engage in other concerted activity. . . ." 29 U.S.C. §157 (1982).[2] Our analysis, then, is focused

3. 2. The parties do not dispute that the BGC, as well as the IGA, are "labor organizations" within the meaning of section 2(5) of the Act, 29 U.S.C. §152(5) (1982).

on whether, under the facts of this case, PECO interfered with, restrained, or coerced its employees in organizing, forming, joining, or assisting the BGC.

PECO and the Board correctly argue that because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO had no independent obligation to listen to or recognize the BGC for purposes of its members' grievances. *See, e.g., Morrisville Cotton Mills*, 2 N.L.R.B. 952, *modf'd and enf'd*, 94 F.2d 61 (4th Cir. 1938). They also correctly point out that the agreement with the IGA to accord its members privileged treatment for grievance purposes is not, standing by itself, unlawful under the Act. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938) (holding that "members-only" agreements with non-majority unions do not violate sections 8(a)(2) or 8(a)(1) of the Act). But the Board and PECO err when they conclude that the combination of the two principles, privileged treatment of one non-majority union with a refusal to treat another equally, does not violate the Act

The underlying premise to the decision of the ALJ and the Board is that privileged treatment of one non-majority labor organization over another does not violate the Act where neither organization seeks exclusive bargaining representative status under section 9(a) of the Act, 29 U.S.C. §159(a) (1982). App. at 19–20. The ALJ's reasoning seemed to be that because neither the IGA nor the BGC sought to be the exclusive bargaining representative of PECO's employees, PECO's privileged treatment of the IGA neither assisted nor coerced employees in selecting the bargaining representative of their choice. Absent this encouragement or discouragement in the choice of bargaining representative, the ALJ concluded that PECO's activities did not interfere with any protected activities of the BGC or its members.

The fatal flaw in the ALJ's reasoning and the Board's silent adoption of its conclusion is the limitation placed

on employees' rights under section 7. Although the ALJ correctly noted that encouragement or discouragement of an employees' choice of exclusive bargaining representative violates the Act, he erred in not recognizing that the protection of section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity.

The language of section 7 itself recognizes a distinction between the rights to "self-organization," to "form, join, or assist labor organizations," to "engage in other concerted activity," and the right to "bargain collectively through representatives of their own choosing." 29 U.S.C. §157 (1982). The right to band together for self-organizational purposes has consistently been recognized apart from the right to choose an exclusive bargaining representative. *See e.g., NLRB v. Northeastern University*, 601 F.2d 1208, 1216-17 (1st Cir.1979) (preventing one employee organization from using student center while allowing other employee organizations to do so violates section 8(a)(1)); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347, n. 6 (3d Cir.1969) ("The joining in protests or demands, even by a small group of employees, if in furtherance of their interests as such, is a concerted activity protected by the Act. It is not necessary that union activity be involved or that collective bargaining be contemplated," quoting from Annot., 6 A.L.R.2d 416, 434 (1949)).

The importance of protecting an employee's choice to organize in one particular group as opposed to another group, even where neither group seeks exclusive bargaining status, is illustrated by the case before us. In 1968, several black employees broke off from the IGA because they believed that the IGA was unresponsive to discriminatory practices at PECO. App. at 9. Because the IGA was not and has never been recognized as the exclusive representative of PECO's employees, the black employees could not force the IGA to handle their griev-

ances fairly or to show greater concern for the alleged discriminatory practices at PECO. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64, 95 S.Ct. 977, 985, 43 L.Ed.2d 12 ("[B]y the very nature of the *exclusive* bargaining representative's status as representative of *all* unit employees. Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit."). Whether necessary or not, therefore, the BGC members perceived a need to band together to promote their common interest in having their grievances heard concerning discrimination in the workplace.

[3] As the ALJ found, PECO, by favoring the IGA in the presentation of grievances, necessarily encouraged membership in the IGA for those employees who desire a more formal, and presumably more powerful, grievance mechanism, and discouraged membership in the BGC. App. at 17 ("It is likely that [PECO's] treatment of the IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC."). Because the BGC was not formed "with a view towards obtaining section 9(a) [exclusive representative] status," however, the ALJ found no violation of section 8(a)(1). This reading of the rights protected by section 7, and enforced through section 8(a)(1), is too narrow, and frustrates one of the central protections of the Act—allowing employees to band together for specific grievances. Because PECO's privileged treatment of the IGA encourages membership in that group and discourages membership in other groups, including the BGC, PECO has interfered with and coerced employee choice in self-organization, and in forming, joining, and assisting a labor organization.

Because of the novelty of the issue before us, we are careful to delineate the scope of our decision.[3] We are not

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3. The Supreme Court has not considered the issue before us, and expressly reserved decision on a similar formulation of the issue

holding that an employer violates section 8(a)(1) merely when it refuses to listen to or accord special status to the grievances of a minority labor organization, even if that refusal will affect the ability of that organization to attract members. Rather, we are holding that when an employer accords one non-majority group privileged status over another non-majority group, and thus encourages membership in the former while discouraging it in the latter, he unlawfully interferes with the section 7 rights of employees to band together in the group of their choice, even though neither organization seeks section 9(a) exclusive representative status. To hold otherwise would force employees, if they desire leverage against their employer, to join employee groups favored by the employer, despite the employees' belief that the favored group will not act in their best interest, and cannot be legally forced to act in their best interest. This discourages the right to self-organization, the right to form, assist, and join labor organizations, and the right to engage in concerted activity, and thus violates the Act.

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in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 47, 74 S.Ct. 323, 339, 98 L.Ed. 455 (1954) ("We express no opinion as to the legality of disparate payments [between union and non-union employees] where the union is not exclusive bargaining agent. . . ."). Nor does our decision in *NLRB v. Reliance Newspaper Delivery, Inc.*, 187 F.2d 547 (3d Cir. 1951) impact on our holding. In that case, an employer was charged with violating section 8(a)(3) and through it, section 8(a)(1), by paying members of a non-majority closed union, but not non-union employees, retroactive pay. This court found no violation of section 8(a)(3) because there was no evidence of discriminatory intent on the part of the employer, and because, even assuming discriminatory intent, the employer's activities could not have encouraged or discouraged the non-union employees into joining the closed union because the closed union would only allow the first male issue of each member to join. 187 F.2d at 552. The first rationale for the court's decision was subsequently discredited in *Radio Officers' Union v. NLRB, supra*, while the second rationale distinguishes that case from the instant one. In this case, the ALJ found that PECO's activities encouraged employees to join the IGA and discouraged membership in the BGC. App. at 18.

## III.

[4] Because we find that PECO's discriminatory treatment of the BGC constitutes a violation of section 8(a)(1), we must remand to the Board for consideration of PECO's purported business justifications, and for an appropriate remedy if no business justification exists. On remand, however, the Board should consider three last points. First, if the BGC proves its allegation that a determining factor in PECO's decision not to accord the BGC equal privileges to the IGA was the racial composition of BGC's leadership and membership, PECO will have committed an independent violation of section 8(a)(1) for which no business justification exists. *See, e.g., United Packinghouse, Food and Allied Workers International Union v. NLRB,* 416 F.2d 1126 (D.C. Cir.), *cert. denied sub nom. Farmers Cooperative Compress v. United Packing House Workers,* 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179 (1969); *Jubilee Manufacturing Co.,* 202 N.L.R.B. 272 (1973).[4] Second, any purported business justification offered by PECO on remand may not relate to PECO's "preference" for the IGA as employee representative, for it is this very preference, and PECO's failure to accord the BGC and its members similar status, which establishes the prima facie violation of section 8(a)(1).[5] Finally, we do not suggest that the only appropriate remedies for PECO's conduct are to either disman-

4. Race discrimination is not a *per se* violation of the Act. *Jubilee Manufacturing Co., supra.* Rather, there must be a nexus between the alleged discrimination and the interference with section 7 rights. Because the ALJ and the Board found that PECO did not violate the section 7 rights of BGC members, they did not consider whether a nexus existed between the alleged racial discrimination and the interference with section 7 rights. Because we have found a section 8(a)(1) violation to exist, the Board on remand should consider whether a nexus does in fact exist.

5. Indeed, the concept of business justification as an affirmative defense to a section 8(a)(1) violation is generally limited to an employer's legitimate interests in plant safety, efficiency, or discipline. R. Gorman, *Basic Text on Labor Law* 133 (1976).

tle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one. Rather, a grievance system which accords all employees, and not just members of a privileged group, the leverage of group representation for individual grievances will remove the unlawful coercion on employees to either join the privileged group or forego group representation for individual grievances.

The Board's order is therefore set aside, and the matter remanded for further proceedings consistent with this opinion.

# UNITED STATES OF AMERICA
# BEFORE THE
# NATIONAL LABOR RELATIONS BOARD

PHILADELPHIA ELECTRIC COMPANY
and Case 4—CA—11253
HAROLD GLASS, an Individual
and Case 4—CA—12547
EDWARD JOHN KELLY, an Individual

## DECISION AND ORDER

On 5 November 1982 Administrative Law Judge Bruce C. Nasdor issued the attached decision,[1] The General Counsel and Charging Party Harold Glass filed exceptions and supporting briefs, and Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs, and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recomended Order.

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1. The judge issued errata to his decision on 12 November and 9 December 1982.

2. Charging Party Harold Glass has requested oral argument. The request is denied as the record, the exceptions, and briefs adequately present the issues and the positions of the parties.

3. No exceptions have been filed with respect to the judge's dismissal of the allegation that Respondent violated Sec. 8(a)(3) of the Act.

4. The judge inadvertently neglected to make a specific finding concerning the labor organization status of the Black Grievance Committee. We correct the judge's inadvertent omission based on the record evidence and on Respondent's concession, and conclude that the Black Grievance Committee has been, at all times material herein, a labor organization within the meaning of Sec. 2(5) of the Act.

We agree with the judge that Respondent did not, prima facie, interfere with the Sec. 7 rights of its employees by not according the Black Grievance Committee concurrent status with the Independ-

**ORDER**

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. 10 February 1984

Donald L. Dotson,
Chairman

Robert P. Hunter,
Member

Patricia Diaz Dennis,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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ent Group Association. We therefore find it unnecessary to pass upon the business justifications proffered by Respondent as a defense to its position.

In concluding that Respondent did not violate Sec. 8(a)(1) of the Act as alleged, Chairman Dotson and Member Dennis find it unnecessary to rely on the judge's citation of *Bruckner Nursing Home*, 262 NLRB 955 (1982), and *RCA Del Caribe*, 262 NLRB 963 (1982).

**UNITED STATES OF AMERICA**
**BEFORE THE**
**NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES WASHINGTON, D.C.**

PHILADELPHIA ELECTRIC COMPANY
and Case 4—CA—11253
HAROLD GLASS, an Individual

PHILADELPHIA ELECTRIC COMPANY
and Case 4—CA—12547
EDWARD JOHN KELLY, an Individual

**ERRATUM**

The appearances in the above-captioned case inadvertently listed H. Thomas Felix, II, David R. Keller, Karl A. Fritton, and Robert G. Kelly as Attorneys for the Independent Group Association. It is hereby corrected to reflect that only Robert G. Kelly represents the Independent Group Association. H. Thomas Felix, II, David R. Keller, and Karl A. Fritton are Attorneys representing Respondent.

Dated, Washington, D.C. December 9, 1982

Bruce C. Nasdor
Administrative Law Judge

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES**

PHILADELPHIA ELECTRIC COMPANY

and Case No. 4—CA—11243

HAROLD GLASS, An Individual

PHILADELPHIA ELECTRIC COMPANY

and Case No. 4—CA—12547

EDWARD JOHN KELLY, An Individual

*Carmen P. Cialino, Jr., Esq.*, and *Margaret M. McGovern*, for the General Counsel.

*Alice W. Ballard, Esq.* and *Herbert Newberg, Esq.*, for the Charging Party Harold Glass and the Black Grievance Committee.

*H. Thomas Felix, II, David R. Keller, Karl A. Fritton, Esq.* and *Robert G. Kelly, Jr.*, for the Independent Group Association.

## DECISION

### Statement of the Case

BRUCE C. NASDOR, Administrative Law Judge: This case was tried at Philadelphia, Pennsylvania, on March 8, 9, 10 and 11, and April 19, 20, 21, and 22, 1982. An Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing issued on December 31, 1982, alleging that Philadelphia Electric Company (herein referred to as PECO or Respondent), since the fall of 1978 to the present, met with the Independent Group Association (herein referred to as IGA) to discuss wages, hours, working conditions and grievances. It is further alleged that during the same period of time, Respondent has refused to meet with the Black Grievance

Committee[1] (herein referred to as BGC), to discuss these same topics, thereby engaging in disparate treatment in violation of Section 8(a)(1) of the National Labor Relations Act (herein referred to as the Act). General Counsel requests as a remedy, that Respondent be required to grant recognition to the BGC to the same extent that it grants recognition to the IGA.

It is also alleged that Respondent suspended and subsequently discharged Edward John Kelly, because he supported and assisted the BGC and provided assistance to the Philadelphia Human Relations Committee (herein referred to as PHRC), in violation of Sections 8(a)(1) and (3) of the Act.

Upon the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs[2] I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent is, and has been at all times material herein, a public utility engaged in the generation, transmission, distribution and sales of electricity, with a principal place of business located at 2301 Market Street, Philadelphia, Pennsylvania.

During the past year, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $250,000, and purchased and received goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania.

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1. In its Answer and at the hearing, Respondent denied that the Black Grievance Committee was a labor organization within the meaning of the Act. In its brief it now concedes that the Black Grievance Committee is a labor organization within the meaning of Section 2(5) of the Act.

2. The IGA did not file a brief in this matter.

The Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

## II. The Labor Organizations

IGA has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## III. The Alleged Unfair Labor Practices

PECO is a public utility with corporate offices located at 2301 Market Street, Philadelphia, Pennsylvania. It operates in the States of Pennsylvania and Maryland serving approximately 3.7 million people, producing electricity, gas and steam. PECO employs approximately 10,000 individuals. There are also contingent workers in the employ of a contractor, Henkels and McCoy, at PECO'S Oregon shop. Tyrone Frazier, who will be discussed later, is one such individual. He considers himself to be in the employ of PECO.

### The Independent Group Association

The IGA has between 42 hundred and 46 hundred members who are PECO employees. This does not include certain individuals at one location, the Chester generating station, who are represented by the International Brotherhood of Electrical Workers. The IGA has been in existence and has been dealing with PECO on issues concerning wages, hours and working conditions for over 40 years. In July, 1969, and in April 1977, the IGA made written requests to PECO for PECO to recognize the IGA as the exclusive representative of all PECO employees for purposes of collective bargaining. In September, 1969, and May, 1977, PECO declined the IGA's request. Since May 1977, the IGA has not made any requests for recognition and has never been certified

by the National Labor Relations Board as the exclusive representative of the employees of Respondent. No labor organization is, or has been, the exclusive representative of all Respondent's employees within the meaning of Section 9(a) of the Act. The IGA files reports with the U.S. Department of Labor and the Internal Revenue Service.

Respondent's personnel and industrial relations department representatives conduct monthly meetings with the IGA. Eight of these meetings are with three IGA representatives and the remaining four meetings are with IGA's entire executive committee. There is an annual luncheon every December.

At these meetings, the IGA presents its views to Respondent's management regarding wages, hours, and working conditions. As a general practice, changes in these subjects are held for the August 1, general wage and benefit improvement package, which is implemented every year. IGA and Respondent follow a procedure whereby IGA presents to management requests for items to be included in the August 1 package, and other matters involving working conditions. Respondent's representatives discuss these items with the IGA at various meetings including two, which are held for the sole purpose of discussing the August 1 package. Essentially, IGA is merely contributing input, because after the meetings, Respondent unilaterally implements its policies which apply to all employees regardless of their labor organization affiliation.

From the period September, 1978 to the present, 25 areas have been discussed by Respondent with the IGA.

Respondent gives IGA the right to post minutes of meetings and notices of meetings on its bulletin boards.

IGA officials are permitted to use parking lots, when conducting union business, these lots are normally reserved for Respondent's management personnel.

Respondent also makes references to the IGA in its employee handbook, "You And Your Company," as the group with which it meets to deal with matters involving wages, hours and working conditions.

At IGA's request, beginning January 12, 1981, Respondent agreed to dues deductions for IGA members who submit written checkoff authorizations to the Respondent.

BGC has never requested a dues checkoff procedure from the Respondent.

Charles Fritz, Respondent's vice president of personnel and industrial relations, and Respondent's chief executive officer responsible for personnel matters, testified without contradiction that the BGC has never requested Respondent to meet for the purpose of discussing wages or benefits. Moreover, his unrefuted testimony is that Harold Glass,[3] a BGC representative, advised him that the BGC was not interested in working with Respondent in the area of wages and benefits.

There is no evidence that the BGC has never requested mention in the employee handbook, or checkoff.

**Respondent's Grievance Procedure**

The testimony adduced at the hearing, concentrated primarily upon the disparate manner by which Respondent treats the IGA and the BGC with reference to the processing of grievances. All employees process their grievances through their immediate supervisors and then through higher levels of supervision within their own department. Any employee presenting a grievance may be accompanied by another employee of the company to represent him during this phase of the grievance procedure. It is uncontradicted that Respondent has permitted members of the BGC, including Harold Glass, to

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3. Glass, the Charging Party, has been Treasurer and a member of the executive committee for 10 years.

regularly represent employees in the processing of grievances.

After the grievance goes through the immediate supervisor, an employee may elect to have his grievance presented to the personnel and industrial relations department in two separate ways. Employees represented by the IGA, may choose to have their grievance presented in writing by IGA representatives at the periodic meetings referred to earlier. When the grievance is presented to Fritz, the employee is not necessarily present. After a written and oral presentation at the meeting, the grievance is investigated and Fritz issues a written answer. In the event that his Answer is negative, there is a fourth step appeal. A meeting is held between the employee, the IGA representative, supervisors from the employees' department and John J. McGinley, Respondent's manager of personnel and industrial relations, who is responsible to and reports to Fritz. McGinley mediates the disputes, paying particular attention to anything which may have been overlooked at the third step. He recommends a disposition to Fritz, and Fritz then issues an answer, if he has changed his initial decision. Since September 1, 1978, IGA has presented approximately 242 grievances at the third step, and in excess of 30 grievances at the fourth and final step.

Employees who are not members of the IGA and employee members who do not wish to follow IGA procedure follow a different route after exhausting their departmental remedies. They meet directly with various representatives of the personnel and industrial relations department including Fritz. They may be represented by another employee of their choice, and record testimony reflects that members of the BGC, including Harold Glass, have represented employees in grievance meetings with various personnel department representatives, including Fritz. As a general rule Respondent does not respond to individual grievances in writing, as the ag-

grieved employee is permitted to present his grievance personally to Fritz and receive an answer orally, following investigation of the grievance.

There is a third variation of grievances not alluded to in PECO's handbook. When a group of employees with a common grievance do not elect to utilize the IGA, the Respondent will meet with the men en masse or with representatives of the group for the purpose of resolving the grievance.

In an individual grievance, when Harold Glass represents an employee, he may or may not hold himself out as a BGC representative. In either event, Respondent regards him as merely one employee representing another. It refuses to accord Glass BGC status during a grievance meeting. Furthermore, Respondent has refused to employ a process whereby the BGC can attend group meetings with the personnel department to present individual grievances in the same manner and by the same mode as the IGA. These are the practices which are alleged as violations of Section 8(a)(1) of the Act.

Fritz testified that he has told the BGC beginning in 1970 or 1971 that management did not believe it was proper to break the company up into ethnic groups. He did not think it would be a wise thing to break the company up into a black group and then a group that might essentially become a white group. The employee complement would then begin to further polarize into other ethnic backgrounds. Moreover, according to his testimony, he meets on a periodic basis with a group of catholic employees, and he would not want to see them set up a grievance procedure based on their catholic backgrounds. He testified that creating splinter groups would be impractical both from a time and an economic standpoint.

On September 12, 1978, representatives of the personnel department and the BGC met to discuss individual grievances. Minutes of this meeting have been received in evidence as General Counsel's Exhibit 3. In

that meeting Fritz again advised representatives of the BGC that PECO Company does not recognize it as appropriate to deal with, in resolving individual grievances. He told BGC representatives that in the past he had told other groups of employees such as the foremen's association and the linemen's association that he believed it was not in the best interest of the employees to divide the company along racial lines. Arnold Hall, a BGC representative, informed Fritz that he should meet with them as grievance representatives, but Fritz continued to maintain that he thought it was improper to split the company along black and white lines. Again on September 26, 1978, and October 19, 1978, Fritz refused to process individual grievances at meetings with the BGC. At the meeting held on October 19, 1978, Fritz reiterated his reasons (he felt) "that it was wrong and divisive to have black employees process grievances through one group and white employees process grievances through another group, and repeated the fact that he could not formally process grievances through more than one group. He stated he was not closing the door on any future meetings with the BGC, and Mr. Hall indicated that they were not saying that they would not work through the IGA."[4] In its current posture, since September 1978, BGC representatives such as Glass are permitted to represent and participate in grievance meetings as concerned employees. When a BGC representative attends such a meeting, he or she is told that the Respondent refuses to acknowledge the individual as a BGC representative, or as appearing on behalf of any group or organization. Therefore Glass has not been able to bring anyone else with him from the BGC to handle grievances because Respondent would be then viewing the BGC as representing the aggrieved employee. Glass is cognizant

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4. This quote appears in the stipulation, received in evidence as Joint Exhibit 1, paragraphing 6(d). The IGA did not join in this stipulation.

of the fact that Fritz is aware that he is a BGC representative, and therefore he does not in each and every instance request that he be considered a BGC representative. Fritz does not articulate that he is not recognizing Glass as such, at each and every meeting.

It is conceded that Fritz will meet with the BGC about any matter except individual grievances.

**The Black Grievance Committee**

The BGC was formed in 1968, by several employees because the IGA seemed unresponsive to alleged discriminatory practices on the part of Respondent.

The BGC is composed of Respondent's employees, former employees and their families. Harold Glass testified that its purposes are, *inter alia*, to assist employees in transfers and consideration of such matters as upward mobility for minorities and job testing.

Wendell Storey, BGC chairman testified that the BGC does not file reports with the U.S. Department of Labor, Internal Revenue Service, or any other government agency. According to its constitution, which was not adopted until 1972, the BGC is governed by a main committee elected every 2 years by the general body. Voluminous record testimony reflects that the BGC does not follow this prescription. Rather, members on the main committee are selected by other members of the main committee, and the general membership has not voted on a main committee position since 1968. Moreover, the testimony is conflicting as to whether members of the main committee re-elect themselves and whether this is done sporadically or with any regularity.

According to the constitution, all dues collected by the BGC "shall be utilized for legal services, operating expenses and educational benefits for minority employees of the Philadelphia Electric Company." Harold Glass, the Charging Party, testified that in actuality the BGC's dues are used to pay lawyers.

Based on Glass' testimony, dues are collected sporadically rather than on an annual basis. Moreover, there has been no election of union officers since the BGC came into existence.

From its beginning in 1968 until 1980, the BGC was constituted of and for, minority employees, and its purpose was to resolve problems of minority employees only. Glass testified that as he understood it, minorities included all persons accept White males. Specifically, minorities, according to Glass' testimony, means white females, hispanics, male and female, and Blacks, male and female.

The executive committee, which handles grievances, is an all black committee.

In January 1980, Edward Kelly, the Charging Party in Case No. 4-CA-12547 became a member of the Black Grievance Committee. Thereafter, BGC's policy changed, when in the spring of 1980, Harold Glass commenced to process Kelly's grievance. Kelly is a white male. This was the first time a grievance was processed on behalf of a White employee. Glass was unable to testify whether or not any white employees had been admitted to membership to the BGC prior to January of 1980.

At the present time the BGC does not restrict admission to black members. Moreover, based on the testimony of two white males, the BGC has admitted them to membership and assisted them with problems.

Glass testified that at the present time there are between two and three hundred individuals who are members of the BGC. The record does not reflect how many of these members are current employees, former employees or family members. Nor does the record reflect how many of the members work for other contractors.

**The Discharge of Edward John Kelly**

Kelly, the Charging Party, had been employed by Respondent from 1963 to October, 1981, when he was terminated. For the last several years prior to his discharge, he was employed as an electrician in the Bushing repair shop, within the electrical maintenance division. Kelly joined the IGA in 1964 and remained a member until his discharge. In 1973, he became a shop steward at the Oregon shop and remained until his discharge. He became disenchanted with the IGA and in the early part of 1980, January, he joined the BGC.

Kelly testified that on the morning of April 10 1978, he and a co-worker, John Hornung, engaged in a physical altercation prior to the commencement of the shift and off of company property. According to Kelly, Hornung made an ethnic slur to him. "He offered me outside. I thought it would be just a verbal match. We went out about a block and a half from the company." Kelly's testimony and written memorandum (General Counsel's Exhibit 6), of the incident reflect that "I found myself following him (Hornung) out of the gate and west on Oregon Avenue. . . . I looked for a safe place to lay my glasses." When Kelly turned his back, Hornung hit him on the back of the head with a piece of lumber, perhaps a two by four or a four by four. As a result of the injury, Kelly left work and did not return until August, 1978. Kelly prevailed in criminal and civil actions, but if he is to be believed, Hornung continued to agitate him.

On August 29 and 30, 1978, Kelly commenced to embark on a mission, a veritable crusade, to have the chronology of what will be characterized throughout this decision as "the Hornung incident"[5] placed in his personnel file. He bypassed his immediate supervisors

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5. Since the incident prior to the start of the shift and off of Company property, neither employee was disciplined, although the incident was investigated. Both employees were interviewed and their statements placed in their personnel files.

Crouthamel, a subforeman, and Raudenbash, the foreman, complaining to Onley, supervisor of electrical maintenance, that Hornung was harassing him by parading around carrying mock weapons. In response to this complaint, management, including Onley and his supervisor, Whitfield, general superintendent of maintenance, met with Kelly and Hornung on September 1, 1978. At this meeting although management was not convinced that Hornung was harassing Kelly, they instructed him to avoid Kelly.

Thereafter, similar complaints by Kelly to management ensued. On September 20, 1978, Kelly complained to Onley that Hornung would walk past his work area carrying an axe. Onley investigated and found that Hornung, a carpenter, was directed by his supervisor to procure the axe. Kelly also complained about the way Hornung looked at him. Onley investigated each of Kelly's allegations regarding Hornung. He concluded that they were unfounded.

In October, 1978, Kelly went to see Whitfield, complaining again about harassment and requesting a written statement be made part of his personnel file. Whitfield refused to document the alleged friction between Kelly and Hornung. Shortly thereafter, Kelly was on disability from on or about October 18, 1978, to May 15, 1979 (approximately 30 weeks), as a result of an injury sustained in his back from falling off of a chair.

In November, 1978, while still on disability, Kelly met with O'Connell, president of the IGA, Downs, of Respondent's personnel department and Dr. Hushion, director of Respondent's medical department. Kelly complained about harassment from Hornung and requested that it be documented in writing and put into his personnel file. According to Kelly, Downs responded there was nothing Respondent could do for him because it was not responsible for the fight with Hornung.

On May 23, 1979, when Kelly returned to work after his period of disability, he and his wife met with Dr.

Hushion to discuss his return to work. Hushion suggested that Kelly might be able to arrange a transfer to a different department, but added that the transfer would cost him a 10 percent cut in pay. Under these circumstances Kelly was not interested in a transfer.

During the first week of June, 1979, Hornung reported to management that Kelly spit on his shoes while in the storeroom area. Kelly was called to a meeting with Onley, where he was accused of this conduct. He became very upset, and on June 5 went on disability again for anxiety and depression. Kelly did not return to work until December 19, 1979, that is, 27 weeks and 1 day.

Kelly testified that president O'Connell of the IGA arranged a meeting with Whitfield, Kelly, Hushion and Kelly's immediate supervisors in September, 1979. He testified further that the meeting was held to minimize the contact between Hornung and himself. His memorandum, General Counsel's Exhibit 6, reflects that the purpose of the meeting was "to try to resolve the matter so life could go on." On October 4, 1979, Kelly testified that he called Joseph Gallagher, manager of the electrical production department and Whitfield's supervisor, to discuss the conditions under which Kelly could return to work without anxiety. At the meeting Kelly requested of Gallagher that a co-worker Kembring be allowed to work with Kelly exclusively, in order to teach Kelly the job. Kelly again requested that the Hornung incident and later incidents be included in his personnel file and contended that the problems were Hornung's fault. He requested also that he be moved into the bushing shop. Gallagher agreed that he could place Kelly in the bushing shop, with the qualification that Kelly would have to work in other areas as well if maintenance management directed him to do so. Further, that Respondent could not allow Kelly to work exclusively with Kembring, or agree to place a memorandum in Hornung's file. The

meeting lasted approximately 2 hours and Gallagher memorialized it in a memorandum which was received into evidence as the Respondent's Exhibit 10.

Gallagher testified that after this meeting he had a number of telephone conversations with Fritz about returning Kelly to work. Gallagher told Fritz he did not think Kelly was ready to come back to work and recommended that he not be returned. According to Gallagher's testimony Fritz was attempting to find a way to effect Kelly's return and make him a useful employee. Gallagher testified further that he thought Fritz was most reluctant to terminate Kelly at that time.

Whitfield testified that towards the end of 1979, it came to his attention that a pool was being run among the employees in the shop. For $1, an employee could pick a time which would be the closest to when Kelly returned to work off of sick leave benefits. An employee or employees asked Whitfield if he wanted to "get in it for a buck." In the words of Whitfield, "it was a big joke." Whitfield decided to conduct a survey[6] of Kelly's absences. He testified "so I ran a survey which indicated to me that Ed (Kelly) was taking off just about as much time as he was entitled to, and he was getting miraculously well when his benefits ran out. And, this made me feel that Ed was making a mockery of the Company benefits and taking advantage. I therefore recommended to Joe Gallagher that he not bring him back. He (Kelly) was out at the time, and I said 'don't bring him back.' " Whitfield testified further that this was not the only reason he made such a recommendation to Gallagher. Other factors were the problems Kelly was having with other people, the reports Whitfield was getting in his office about Kelly walking off the job, spending too much time on the telephone, low productivity, and all these things in combination with his absences.

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6. Received in evidence as Respondent's Exhibit 7.

Fritz testified that during the same period of time, "Dr. Hushion called me and stated that there was a man by the name of Kelly in the maintenance division who had been off sick for some period of time, and that Dr. Hushion felt that there was a chance that this person could be turned around and be made a productive employee."

Subsequent to these recommendations, Fritz and Hushion met with Kelly and his wife in December of 1979. Fritz advised Kelly of his poor absenteeism record and that the Respondent could not continue for an indefinite period of time with an employee with such a poor service record. After this meeting, Fritz determined to give Kelly another chance, and did not terminate him.

On December 6, 1979, Fritz called for a meeting between Kelly and himself. Fritz, according to Kelly's own testimony, wanted to talk with him about the conditions under which Kelly felt he might be able to go back to work comfortably at the Oregon shop. At this meeting, Fritz agreed to let Kelly work exclusively in the bushing area.

Based on Kelly's testimony, shortly after his meeting with Fritz, he was authorized to return to work. Instead, he decided to take a 2-week vacation, and did not return until January 7, 1980.

In January, 1980, he joined the BGC to pursue his mission to memorialize his Hornung syndrome in writing, to be placed in his personnel file.

At about the time Kelly returned to work in January, 1980, Crouthamel began to document[7] his work habits and performance. Crouthamel testified that the documentation reflected Kelly's lateness and absenteeism record, early quits and general work performance. According to Crouthamel's uncontradicted testimony,

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7. In evidence as Respondent's Exhibit 8 and 9.

higher management advised him that his problems with Kelly would have to be documented to be given any credence.

On February 20, 1980, Kelly called Harold Glass and told him that he desired to document Hornung's behavior in his, Kelly's personnel file. Glass advised him to draft a chronology, which he did on February 24, 1980. On March 6, 1980, Kelly called Fritz with his request. Fritz told Kelly to make his request to Whitfield first, i.e., go through the chain of supervision. Whitfield was unavailable, so Kelly contacted Whitfield's superior, Gallagher, who again refused to place the document in Kelly's personnel file. Undaunted, Kelly called Fritz again, refusing to follow channels to Whitfield. Fritz, after some conversation, became angry, lost his temper and hung up. Then, on the same day, Kelly called Respondent's president J. Lee Everett. Everett told Kelly to go through Whitfield and then assured him he would be allowed to see Fritz.

Finally, on March 12, 1980, Kelly met with Whitfield. He was accompanied by Glass, who according to his testimony, he introduced as a representative of the BGC.[8]

Whitfield testified that during the course of his meeting with Kelly and Glass, it became obvious to him that Kelly was so concerned about documenting the Hornung incident in his personnel file that he, Whitfield thought it was a situation the medical department should be involved in. Whitfield interpreted Kelly's behavior, in his words "obsession," as not being normal and not within the sphere of his experience. Therefore, he believed he needed help from the medical department. He again refused to put Kelly's document into his personnel file and sent him to Dr. Hushion.

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8. Glass and Whitfield testified that the BGC was not mentioned.

Prior to Kelly's appointment with Hushion, Hushion called Mrs. Kelly to discuss his problems in the Oregon shop particularly his "obsession" which had been continuing for nearly 2 years. According to Hushion he told Mrs. Kelly he was concerned that if her husband persisted in his demands the department might take some disciplinary action against him or Respondent might be forced to put him on a medical disability, if the medical department determined that his conduct and absenteeism were due to anxiety and depression. When Kelly and Glass met with the doctor, Hushion related to them his conversation with Mrs. Kelly. After being informed that Hushion had called his wife, Kelly flew into a rage and stated, "I'm liable to go home and find my wife's head in the oven." Hushion assured Kelly that his conversation with his wife was calm and benign. He then called Mrs. Kelly back, in Kelly's presence, to explain why he had called her initially. There is a conflict in the testimony as to whether Hushion told Mrs. Kelly that her husband might be fired. Although in the final analysis I do not consider it critical, I will resolve the conflict later in my conclusions.

Subsequent to the meeting with Whitfield and Hushion, Kelly telephoned Fritz for another meeting. Kelly and Glass met with Fritz and Dr. Cincotta on March 19, 1980. During this meeting Fritz agreed to place the memorandum in Kelly's personnel file. Fritz also agreed to Kelly's request that he be allowed to work in the bushing department, apparently for the second time, although Glass does not remember this.

Kelly continued to visit Dr. Cincotta about his problems. Cincotta had been instructed by Hushion to see Kelly when he visited the medical department, which normally would be when he was out on disability. Kelly saw Cincotta twice within 10 days after the meeting in Fritz' office. During these visits on March 24 and 27,

1980, Kelly continued to complain about the "conspiracy" against him and harassment from his supervisors. Kelly was accompanied by Glass on the March 27 visit.

In July 1980, while visiting Washington, D.C., Kelly fell down the Capitol steps and injured his neck. He began treatment with Dr. Nahas, an osteopath. Nahas testified he saw Kelly about 5 times during this period. On August 15, 1980, Kelly visited Dr. Cincotta. Hushion testified that when an employee is absent for any period of time, he is required to visit the medical department periodically in order to confirm that he is legitimately disabled. Kelly was out with his neck injury from July 23, 1980, to December 15, 1980. Cincotta testified that Kelly overreacted in his responses, during the examination, making it difficult for Cincotta to examine him. Cincotta testified that he felt it was inappropriate for the type of examination he was giving Kelly. Cincotta also testified that Kelly had been out approximately 4 weeks with a neck injury, and that he presented a note from his physician indicating he would be out an additional month. Cincotta stated that he suggested to Kelly he felt that was an inordinate amount of time to be off with this type of a problem. Cincotta explained to Kelly that the medical department was reviewing cases of employees who had exhibited absenteeism problems due to medical reasons. He explained that due to the so-called guidelines for employees, a closer look would be taken at his type of absenteeism record. Moreover, hopefully these employees would show some improvement when their records were reviewed. Cincotta explained further to Kelly that the medical department intended to review each case individually and that if the employees did not show significant improvement, they might be subject to disciplinary action.

Cincotta called Nahas[9] after Kelly left his office.

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—9. Cincotta placed two calls on August 15, 1980. During one call he reached the Secretary, as Nahas was out of the office.

Cincotta's testimony and notes (in evidence as Respondent's Exhibit 12) reveals that Nahas felt that to a degree, Kelly was malingering, and he needs psychiatric counseling.

Nahas testified that although he was unable to remember much of the telephone conversation, he remembered Cincotta saying that Kelly was a troublemaker going to the Black Grievance Committee. Kelly requested Nahas to prepare a "to whom it may concern" document which is dated September 29, 1980[10] and in evidence as Respondent's Exhibit No. 4. Nahas states in the document "He (Ed) had tried to cause some problems by bringing complaints to the Black Grievance Committee."

Cincotta's notes reflect that during one of the telephone calls he was advised by Nahas' secretary that Nahas suggested to Kelly that there was an emotional problem aggravating his condition and he should seek appropriate consultation.

In blaming management for his illnesses, Kelly testified that the fall down the Capitol steps, "wasn't just a pull in the back, it was anxiety produced."

Kelly continued to see Cincotta during the fall of 1980. He had a note from his personal physician releasing him for work. Cincotta felt that because of Kellys medication, a combination of pain reliever and muscle relaxer, which can cause drowsiness and sedation, it would not be in the best interest of safety to allow Kelly to return to work. Cincotta advised him to take another week off. Kelly testified that he accused Cincotta, "you are not trying to run me out of sick time, are you?"

Kelly testified that during January, of 1981, his supervisor Crouthamel had been paying unusually close attention to his work. Crouthamel testified that on February 19, 1980, he asked Kelly how the bushing was com-

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10. Nahas testified he prepared the document within a week or two after the call from Cincotta. In reality the document was prepared 6 weeks after the call.

ing, which enraged Kelly to the point where he began berating Crouthamel and heaping abusive language upon him. When Crouthamel attempted to calm him down by stating, "whoa Ed calm down we're adults, we can talk like adults," Kelly responded, *inter alia*, "Ernie Crouthamel you are going to get sholved up your ass," and "You are a royal pain in my fucking ass."

Later that morning Kelly was instructed to meet with Onley and Crouthamel. He brought along as his representative, Kembring of the IGA. Kelly refused to make any response to the allegations of the earlier incident and testified that during the meeting he became so sick that he threatened to throw up on the rug unless he was permitted to go to the medical department. Kelly was then released to go to the medical department to see Cincotta, who suggested that he see his see his pyschiatrist, Dr. Rushton. This little episode led to a 7-month disability for anxiety, which ended when Kelly reported for duty on September 22, 1981.

It came to the attention of Whitfield that Kelly had contacted the medical department for the purpose of returning to work. On September 10, 1981, Whitfield sent a memorandum[11] to Fritz recommending that Kelly be discharged for the following reasons: (1) a totally unacceptable attendance, (2) Kelly, when he did report to work, insisted that he be worked only in one area of the shop, limiting his flexibility and making it difficult for supervisors to plan assignments. This also causes employee morale problems, as other employees feel that he is given preferential treatment by allowing him to pick his jobs. (3) Kelly's problems getting along with other employees as well as first level supervision. Kelly repeatedly accusing other employees as well as supervision of harassment, which upon investigation the accusations

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11. A document, in evidence as Respondent's 19, which was approved by Joseph Gallagher, manager of the electric production department.

were found to be groundless. The document concludes with Whitfield stating that during the past 5 years Kelly had given no indication of improvement in any of the above areas and recommending that his employment be terminated.

Kelly was suspended for an indefinite duration, during which time he and his wife met with Fritz and Hushion. During this time Fritz' office reviewed Kelly's case with Daltroff, the vice president of electrical production, and with the medical department. Kelly was finally terminated permanently on October 16, 1981.

**Kelly's Involvement with the Philadelphia Commission on Human Relations Complaints (P.C.H.R.)**

Tyrone Frazier, an employee of the independent contractor, Henkels and McCoy, filed a complaint against the Respondent with the Equal Employment Opportunity Commission (EEOC) alleging that Crouthamel racially slurred him. Kelly allegedly overheard the remark. The complaint was deferred to PCHR for investigation. On September 19, 1980, Kelly spoke to a PCHR representative for the first time.

In June, Kelly was called to Whitfield's office. This meeting was for the purpose of investigating the alleged racial slur. Although there is no evidence that Kelly was the subject of any disciplinary action, or anything more than a possible witness to the remark, Kelly would not answer any questions, without a representative being present.

On October 2, 1980, Kelly gave a deposition in a case the BGC had filed against Respondent. Therefore, according to the calendar, during Kelly's meetings with Whitfield, Fritz and Hushion in March 1980, Kelly was not involved in any complaints against Respondent involving discrimination. Nor was he involved in such, when he saw Cincotta in April and August of 1980. After

going on 7-month disability for anxiety[12] in February 1981, Kelly filed his own charge with the PCHR, charging his supervisor with harassment.

On September 24, 1981, Kelly filed another complaint with PCHR alleging discrimination by Respondent for suspending him. This complaint was filed after Whitfield's recommendation and after the machinery leading to the discharge was set in motion.

**The implementation of Respondent's Absenteeism Policy and Disciplinary Guidelines — Disabilitant Payroll**

Respondent's policies are set forth in the employee handbook "You and Your Company," and a memo entitled "Absence — Lateness Control Guidelines." Respondent's policies were supplemented in 1980.[13]

Fritz testified in essence that the guidelines allow flexibility and are applied on a case by case basis. Moreover, the disciplinary guidelines are not applied to individuals with long term or chronic problems, e.g. multiple sclerosis. Absentee control guidelines are not intended to apply to long term disability employees. Other management officials corroborated Fritz.

The record reflects by way of testimony and documentation[14] that other employees with emotional, psychiatric and alcohol related problems received treatment analogous to Kelly's i.e., lengthy tolerance of absences, finally culminating in discharge.

Absenteeism had reached problem proportions, so in 1980, Respondent researched and identified those employees with long-term absenteeism records. The names of 20 employees including Kelly, were placed on a list and given to Fritz's department, with a directive to monitor those employees. Fritz made the medical department

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12. The incident involving abusive language to Crouthamel.
13. See General Counsel's Exhibits 25, 26 and 27.
14. See General Counsel's Exhibit 31.

responsible for meeting periodically with each employee. Hushion instructed Cincotta to monitor their attendance and warn them that continued absences could result in their discharge. Cincotta carried out this edict and warned Kelly two or three times. After a year, a summary and recommendation were sent to Fritz. Thus these 20 employees were in effect removed from Respondent's progressive discipline policies and placed within the sphere of the medical department.

Respondent readily admits that Kelly was not warned by his immediate supervisors. Whitfield testified in answer to why he never warned Kelly in writing about his attendance, "No Mr. Kelly's problem was extended illness, not normal one or two day outages like most attendance problems. Mr. Kelly's problem was a medical department problem. That's why Mr. Kelly did not get any reprimands or warnings through the normal disciplinary guidelines. His attendance was poor because he would take off extended periods of time, not single days which normally fall under the disciplinary guidelines." Onley also testified that he did not warn Kelly because as far as he was concerned Kelly was absent because of medical related problems. The record does reflect that Kelly received a warning from Fritz during their meeting in December 1979, following the recommendation to terminate him, by supervisors of his department.

Three out of the 20 employees were terminated for failure to report to the medical department as scheduled. Employees Spirito and Summeril were placed on the disabilitant payroll. Spirito met the *criteria* for the disabilitant payroll and was to be placed on it when his other benefits expired. Respondent became aware that Spirito, on the days when he was well enough, would work at his brother's business occasionally helping out with customers. Testimony by Hushion was that there was little chance that Spirito could ever return to work in Respondent's employ.

Several employees showed improvement and others were placed in a "wait and watch" category. Campbell was placed on "attendance restrictions." This required very close supervision, doctor certificates, and ineligibility for promotions or merit increases.

Of the 12 individuals dismissed for absenteeism since March 1980, 5 were previously suspended. Others received no warnings, some received one warning and some received as many as three warnings. There is no real pattern.

The disabilitant payroll coverage for employees who, for medical reasons, are permanently disabled. Benefits are received after the expiration of the employee's sick leave time and other benefits. An employee may be placed on a disabilitant payroll if he has 15 years of service and his personal physician in conjunction with the medical department determine that the employee is permanently unable to work for Respondent. The evidence reflects that Respondent considered Kelly for the disabilitant payroll before terminating him. Fritz requested an analysis of the benefits that would be available to Kelly and asked Hushion to discuss with Rushton, Kelly's psychiatrist, whether Kelly was able to work. Rushton confirmed what he had stated on the certificate when Kelly was released for work on September 23, 1982. Rushton concluded that Kelly was able to work. Accordingly Kelly was not eligible for the disabilitant payroll, in view of the fact that his own psychiatrist declared him fit for work.

## Conclusion and Analysis

### The 8(a)(1) Allegation

Although the litigation was structured in terms of 8(a)(2) and 8(a)(5) violations, Section 8(a)(1) of the Act is the only section alleged to have been violated.

Essentially, counsel for the General Counsel argues that the BGC should be accorded the same status, and given the same advantages as the IGA.

Approximately 40 years ago, Respondent entered into a relationship, noncontractual, with the IGA. There are two features to this relationship. First, the IGA represents individual employees in presenting grievances to management. Second, before Respondent grants its annual wage and benefit package, it meets with IGA representatives to learn the desires of IGA members. Respondent then unilaterally implements its terms and policies. Thus Respondent accords "members only" recognition to IGA, a status held to be perfectly valid and lawful. See *Lyon Dry Goods, Inc.*, 368 U.S. 17.

The fact that Respondent has voluntarily granted certain privileges to IGA, in my opinion does not place an obligation on Respondent to grant equal privileges to the BGC. Neither the IGA or the BGC is an exclusive representative of Respondent's employees within the meaning of Section 9(a) of the Act. Neither organization had demonstrated majority status. It is likely that Respondent's treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC. It must also be recognized that Respondent has not interfered with the rights of any of its employees to join or support the BGC nor has it impeded the BGC in any of its activities, organizational or otherwise.

In my view favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks Section 9(a) status.

Because this case presents somewhat of a novel issue, the parties have cited telephone directories of cases in their efforts to analogize. We probably all would agree that the Supreme Court in *N.L.R.B.* v. *A.J. Tower Company*, 329 U.S. 324 arrived at the conclusion that it is an unfair labor practice, a violation of Section 8(a)(5), for an employer to refuse to bargain only if the Union repre-

sents a majority of the employer's employees. The Board expresses itself clearly and succinctly in *Don Mendenhall, Inc.* 194 NLRB 1109. In that case there was a members only contract and the Board found that there was no violation 8(a)(5). It concluded that—"the Respondent's actions cannot be held violative of Section 8(a)(5. That section, by reference to Section 9(a), requires as a predicate for any finding of a violation, that the employees' representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms." While these and other cases cited, involving Section 8(a)(2) of the Act, teach basics with reference to the Board's concept of minority representatives, they do not focus on the central issue involved herein. Are employees being deprived of Section 7 rights?

It seems to me that counsel for the General Counsel is attempting to utilize Section 7 as a vehicle for demanding bargaining rights which do not exist, based on Board and court law. The record is manifestly clear that the Respondent grants to all of its employees the right to a representative in a grievance situation.

These rights are derived from Section 7 and 9(a) of the Act. The Respondent herein has a very detailed grievance machinery which is available to all of its employees. This is not a situation like that presented in *United Aircraft Corp.*, 179 NLRB 935, where there was serious doubt of the Union's cointinued majority status and an absence of evidence that the Union enjoyed such status. In that case the employer refused to allow its employees to be represented by Lodge Stewards. The Board concluded "as the Respondent's obligation to honor employee requests for union stewards was dependent upon the majority status of the Union, and as the majority status of Lodge 1946 was not established during the relevant period, we find that the Respondent did not violate Section 8(a)(5) by denying such request."

In my opinion Respondent has not frustrated the rights of its employees including BGC members, to engage in protected concerted activity. It meets with groups of employees with common problems or grievances and interacts with their spokesman, thereby providing an access for airing either group or individual grievances. The same is equally applicable to those employees who desire to engage in union activity.

Recently, the Board reevaluated its formula for imposing strict employer neutrality[15] during the pendency of a question concerning representation (QCR). Although in the instant case there is no QCR, the cases *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB No. 115 and the companion case of *RCA Del Caripe, Inc.*, 262 NLRB No. 116 probably illuminate the Board's current views in this area of the law. For my part, I ask myself, if the Board no longer requires neutrality on the facts and circumstances of those cases, how can favoritism or assistance[16] be a violation in this case? In my opinion it is not. Here we have no incumbent union, petition, no QCR and no competition for exclusive representation, I do not believe that the Respondent herein is responsible for organizing its employees, nor is it obligated to organize whether they be IGA members, BGC members or members of any other organizations. Moreover, I conclude that if it chooses to render aid to the IGA, it is not a violation of Section 8(a)(1) to refuse to render concomitant aid to the BGC.

The overwhelming weight of probative evidence reflects that Respondent is not discriminating against its employees. By placing the name of IGA in its handbook and setting up IGA grievance procedures, it may be minimally encouraging in the IGA and discouraging membership in the BGC. In my view, these factors, absent

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15. Which has come to be known as the *Midwest Piping* doctrine.

16. Not in the context of Section 8(a)(2).

discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict employees from joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status. While the Charging Party may complain that he does not have the same leverage as a BGC member that he would possess as an IGA member, he has the right to engage in union or concerted activities to improve his plight and the plight of his organization, including the right to seek exclusive recognition. When all of the facts in this case are marshalled, I reach the legal conclusion that Respondent is not interfering with, or abridging protected employee rights.

Respondent avers that it has legitimate business justifications for not giving the BGC the same benefits and privileges as the IGA. In this regard it does not want to polarize its employees into racially segregated groups, thereby dealing with racially segregated labor organizations. It argues that it would be leaving itself vulnerable to Title VII violations by fragmenting its employees into splinter groups bases on race.[17]

Respondent accord status to the IGA. It advances that this is justified by its large membership, stability and many years of existence. Conversely, it contends that the size of the BGC alone provides justification for refusing to accord it the same status. Respondent also maintains that the name of the BGC, in and of itself, gives the Respondent cause for concern that its formal recognition would lead to racial polarization.

The BGC's primary focus of consideration is the elimination of employment discrimination. Based on Fritz' uncontroverted testimony, in certain matters[18] the

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17. I recognize that the BGC, at the present time, does process grievances of nonminorities.

18. For example: checkoff, parking spaces and mention by name in the employee handbook. There was testimony by Gail Jones that a lower ranking supervisor was requested to provide bulletin board space and refused. The record is silent as to whether this su-

BGC has not even requested equal status or shown even a glimmer of interest for equal privileges. The undisputed evidence is that Respondent meets with the BGC on request, and discusses wages, hours and working conditions. There is no evidence that Respondent has refused to meet with the BGC as a group or that it has refused to accept input from the BGC on matters involving wages, hours, or working conditions.

It is not within my province to speculate as to Respondent's wisdom, or to substitute my judgment for Respondent's judgment in arriving at its business decisions. I do conclude on the basis of this entire record and the above-cited facts, that Respondent has legitimate business reasons for refusing to accord the BGC concurrent status with the IGA, and that by doing so, employees are not being denied their Section 7 rights. Accordingly, I will recommend that the allegation that Respondent has violated Section 8(a)(1) of the Act be dismissed. With respect to Respondent's defense that it refuses to accord status to BGC, based on its admission of supervisors to membership, I find this to be without merit. The Board has long held that supervisory membership in a labor organization is not a basis for refusing to bargain with such a labor organization. In certain industries, for example the newspaper industry, it is common for supervisory personnel to be members of labor organizations although they are precluded by law from directing the affairs or holding office in said labor organization.

Addressing myself to Respondent's 10(b) defense, I find this to be without merit. Marie Wilson testified that on April 24, 1980, a petition was given to a supervisor authorizing the BGC to bring a grievance to management's attention, She testified that no response was given to the petition by Respondent. In my opinion that incident constitutes a revival of BGC's request to

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pervisor had the authority to grant or refuse. At any rate this was not communicated to Fritz.

represent employees and a further revival of the refusal to do so by Respondent. Furthermore, there is undisputed testimony by Edward Kelly that on March 19, 1980, at a meeting with Fritz he introduced Glass as his BGC representative and Fritz responded that they could not proceed with the meeting with Harold Glass present as a BGC representative. The meeting could only continue if Glass acted as an employee representing another employee. Therefore, there is another incident where there was a request and a refusal within the 10(b) period.

**The Discharge of Edward Kelly**

Throughout 8 days of trial, I observed Kelly on the witness stand and seated in the hearing room appearing to be taking copious notes. I am prompted at the outset to make some observations. Kelly impresses me as being so totally enveloped in paranoia, so obsessed with the impression that there was a conspiracy[19] by co-workers and management to get, or harass him, that he has rendered himself wholly nonfunctional as a productive employee. Perusal of the documentary evidence and a reading of the transcript patently reveal an individual so 100 percent caught up in compulsive behavior that he could not have had time to perform the requisite job duties. As a witness he had a tendency to distort and falsely color. Furthermore he had no regard for the truth. Where there exists conflicts in the testimony, I resolve same in favor of Respondent's witnesses and against Kelly. One can only wonder why the City of Philadelphia has not been blacked out for the last 4 years.

By way of contrast, Respondent's management and medical personnel did everything humanly possible to alleviate Kelly's imagined and real discomforts, in an effort to rehabilitate him, including tolerating his excessive absenteeism for an inordinately long period of time. In my experience, I cannot recollect ever seeing an em-

19. See *inter alia* General Counsel 6, p. 4.

ployer exhibit the degree of patience with an employee as this Respondent exhibited with Kelly.

The record is devoid of any direct evidence of animus. The only suggestion of animus[20] is Cincotta's alleged reference to Kelly and the BGC, to Nahas on August 15, 1980, during a telephone conversation. Cincotta was exacting and unerring is his testimony. By way of contrast, Nahas was idefinite, evasive and nebulous. When I propounded several questions to Nahas, he stated that he could not remember whether or not Cincotta used the words "troublemaker." He also admitted that he was drawing inferences rather than quoting, the remark in issue. I conclude that the testimony of Nahas was unreliable and I specifically discredit him. I credit the testimony of Cincotta in every regard.

In 1978 Kelly completed his 15th year in the employ of Respondent. It was in that year that his paid sick leave benefits increased to 30 weeks. At the time of the Hornung fight he was receiving 20 weeks of paid sick leave. He stayed out as a result of that injury for 19 or 20 weeks. From October, 1978, until May, 1979, he used 30 of 30 weeks, when he was out because of falling from a chair. From June of '79 until December of '79 he was out for 27 weeks and 1 day out of 30 weeks, because of anxiety/depression after he had been accused of spitting on Hornung's shoes. From July, to December, 1980, Kelly was out 19 weeks and 3 days out of 30 weeks, because of a neck injury and anxiety/depression. From January 1981, until September 1981, he was out 29 weeks and 2 days out of 30 weeks because of anxiety/depression after the cursing incident. It stretches the bounds of credulity to think that this pattern was legitimate. Even Kelly's co-workers became aware of his deception when

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20. Hushion's remarks to Mrs. Kelly, regardless of what version is accepted, does not rise to the level of animus. Based on Hushion's testimony and Mrs. Kelly's letter, in evidence as General Counsel's Exhibit 8, I credit Hushion and conclude that he told Mrs. Kelly that Kelly could be disciplined or placed on a medical disability.

they began a pool as to when Kelly would return to work. It's no wonder that Whitfield considered Kelly's use of sick leave as a "mockery" of the Respondent's sick leave policy. His record serves as a justifiable and permissible basis for termination, assuming *arguendo*, legitimacy.

The record is replete with efforts on the part of management to improve Kelly's outlook and prevent his long term absences. They coddled and indulged him. They made their medical department facilities and personnel available at his slightest whim. They warned and cajoled him, all to no avail. He received personalized, individual attention. A year before his discharge, he was placed on a list with 19 other employees with poor absenteeism records, in an effort to rehabilitate him. This was but another act of futility. Respondent even involved his wife in an effort to improve his plight. They wanted to fire him in 1979, which preceded any of his protected activity, but upper management decided to work with him longer. Respondent even went so far as to try and arrange to place him on the disabilitant payroll, but his own psychiatrist found him able to work.

Although counsel for the General Counsel does not allege that Kelly was fired for IGA activities, Kelly's own perception may differ. When I asked him why he thought management had this attitude (lack of caring) towards him, he responded "towards me? Because I was very effective as an IGA representative. And at these meeting you do make enemies. Not wilfully, but you do."

Kelly's discharge occurred approximately a year after his involvement in the Frazier case, 8 months after he filed his own charge and approximately 19 months after he went to Harold Glass and the BGC for assistance. During the period 1979 to 1981, his absenteeism, conduct and attitude continued to deteriorate. In my opinion, Respondent does not have to live with Kelly's delicate pysche *ad infinitum*. Respondent no doubt was always waiting for the other shoe to drop. When would some

trivial incident sent Kelly back to the couch and remove him from production for another 29—but never 30—weeks?

I find that the absentee control guidelines were not applied disparately to Kelly, the credited testimony is that they were not meant to apply to special cases of employees with chronic medical problems. In the case of *Teledyne Inc.*, 246 NLRB 766, an employee was fired after being given a warning, while others were given written disciplinary notices or disciplined for the same reason. The employee had an obsessive insistence to be transferred to another department and made frequent complaints to all those who would listen. He made insertions in an operational log book about his complaints and sent letters to management. His attitude towards his work was poor. Although his work evaluations were excellent they were inconsistent with his extremely poor attitude, his failure to observe work rules or safety measures, and his preoccupation with a transfer. He had a tendency to make mistakes resulting in a loss of production and possible damage to equipment. He was not as active as other employees in union and concerted activity. The record reflects that no employee had the same antagonism towards Respondent or this employees' poor attitude. The Board concluded that the employee was discharged for cause, and he was in that case referred to as a "special case." In my opinion this record amply demonstrates that Kelly was indeed a special case.

I find and conclude that Kelly's protected activity was not "a motivating factor"[21] in Respondent's decision to discharge him. There is, in my opinion, no nexus between his termination and his activities involving the BGC, the PHRC, or any other union or concerted activity he may have been involved in. The record establishes irrefutably that Respondent discharged Kelly for cause,

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21. See *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, enforced (1st Cir.) 662 F.2d 889.

and I so find. Accordingly, I will recommend that the 8(a)(3) allegations and the 8(a)(1) derivative allegation be dismissed.

## Conclusions of Law

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The BGC is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The IGA is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. The allegations in the consolidated amended complaint that Respondent has engaged in conduct violative of Sections 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:[22]

## ORDER

It is recommended that the consolidated amended complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. November 5, 1982

Bruce C. Nasdor
Administrative Law Judge

22. If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections to them shall be deemed waived for all purposes.

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**
**21400 UNITED STATES COURTHOUSE**
**601 MARKET STREET**
**PHILADELPHIA 19106-1790**

January 18, 1985

Harold R. Berk, Esq.

Elliott Moore, Esq.

H. Thomas Felix, II, Esq.
Karl A. Fritton, Esq.

Robert G. Kelly, Jr., Esq.

Re: Black Grievance Committee, Petitioner vr. N.L.R.B., et al.
No. 84-3138

Dear Counsel:

Enclosed herewith is copy of judgment entered by the Court today in the above-entitled case.

Very truly yours,

Sally Mrvos, Clerk
Direct Dial 597-3135

cc: Peter W. Hirsch, Director

**UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

| | | |
|---|---|---|
| BLACK GRIEVANCE COMMITTEE, Petitioner, | ) | |
| v. | ) | No. 84-3138 |
| NATIONAL LABOR RELATIONS BOARD, Respondent, | ) | |
| and | ) | |
| PHILADELPHIA ELECTRIC COMPANY, | ) | |
| and | ) | |
| INDEPENDENT GROUP ASSOCIATION, Intervenors. | ) | |

**JUDGMENT**

Before: HUNTER, WEIS, Circuit Judges, and COHEN,* District Judge

THIS CAUSE came on to be heard upon a petition filed by Black Grievance Committee, to review an order of the National Labor Relations Board issued on February 10, 1984, dismissing the complaint against Philadelphia Electric Company. The Court heard argument of respective counsel on November 29, 1984, and has considered the briefs and transcript of record filed in this cause. On December 13, 1984, the Courts, being fully advised in the premises handed down its opinion setting aside the Board's dismissal of the complaint and remanding the Case to the Board for further proceedings consistent with its opinion.

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* Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

ORDERED AND ADJUDGED by the Court that the case be and it is hereby remanded to the Board for further proceedings consistent with its opinion.

BY THE COURT

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Circuit Judge

DATED: January 18, 1985

Office - Supreme Court, U.S.
FILED
MAY 15 1985
ALEXANDER L. STEVAS,
CLERK

Nos. 84-1633 and 84-1641

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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PHILADELPHIA ELECTRIC CO., PETITIONER

*v.*

BLACK GRIEVANCE COMMITTEE, ET AL.

---

INDEPENDENT GROUP ASSOCIATION, PETITIONER

*v.*

BLACK GRIEVANCE COMMITTEE, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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# In the Supreme Court of the United States

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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1. Petitioner Philadelphia Electric Co. (PECO) employs approximately 10,000 employees. Petitioner Independent Group Association (IGA) represents between 4200 and 4600 of PECO's employees and has dealt with PECO on a noncontractual basis on behalf of its members for more than 40 years. The IGA has never voluntarily been recognized by PECO or certified by the Board as the exclusive bargaining representative of PECO's employees; however, IGA representatives meet monthly with PECO personnel

representatives to discuss wages, hours, and working conditions, and appeals of individual grievances of its members. The IGA is acknowledged in PECO's employee handbook as performing these functions. PECO has also allowed the IGA to use company bulletin boards and parking lots, and has implemented a dues checkoff procedure for IGA members. Pet. App. A19-A21.[1]

The Black Grievance Committee (BGC), which represents about 200-300 of PECO's employees, was formed in 1968 to assist minority employees on employment discrimination issues and in processing grievances. Its primary purpose still is to eliminate perceived discriminatory practices in the workplace. PECO representatives have met with BGC representatives on various matters concerning minority employees; although PECO has been willing to discuss wages and other working conditions with the BGC, the BGC has advised PECO that it is not interested in working with PECO on such matters. The BGC also has not sought the use of the company bulletin boards or parking lot, reference in the employee handbook, or dues checkoff. Pet. App. A25-A26, A44-A45. BGC objects only to PECO's refusal to meet with BGC representatives to discuss appeals of individual grievances in the same manner as under the IGA procedure, and to acknowledge the representative status of BGC officials who accompany employees to grievance meetings. Pet. App. A22-A23.[2]

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[1]"Pet. App." refers to the appendix to the petition filed by Philadelphia Electric Co., No. 84-1633.

[2]Under PECO's grievance procedure, which is available to all employees, individual employees first discuss their grievance with their immediate supervisor and, failing resolution at that step, then discuss it with successively higher levels of supervision. If the grievance is not resolved through those supervisory channels, an employee may appeal to the personnel department, and a final, nonarbitrable decision is rendered by PECO's vice president for personnel. At the appeal stage,

Based on this differing treatment of the IGA and BGC in the processing of employee grievances, a BGC representative filed an unfair labor practice charge alleging that PECO violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Board's General Counsel issued a complaint on the charge. Pet. App. A5-A6.

2. The Board, substantially adopting the findings and conclusions of the administrative law judge (ALJ), held that PECO's preferential treatment of the IGA did not violate Section 8(a)(1) of the Act, and accordingly dismissed the complaint. The Board stated that "[n]either the IGA [n]or the BGC is an exclusive representative of [PECO's] employees within the meaning of Section 9(a) of the Act [, 29 U.S.C. 159(a), and] favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks Section 9(a) status" (Pet. App. A41). The Board acknowledged, as the ALJ had concluded, that "[i]t is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC," and

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employees who are members of the IGA may elect to have the IGA process their appeal. Under this procedure, the IGA presents a written grievance at one of its periodic meetings with PECO representatives. The individual grievant is not necessarily present. Following discussion of the grievance, representatives of PECO's personnel department investigate it and the vice president issues a written answer. If the grievance is denied, the employee and his IGA representative may nonetheless choose to meet with the employee's supervisors. PECO's personnel manager mediates at this step and recommends disposition to the vice president, whose decision is final. Aggrieved employees who do not use the IGA procedures present their appeals directly to PECO personnel officials, who then conduct an investigation. PECO's vice president for personnel thereafter decides the grievance and usually presents the answer personally to the grievant. Employees who follow this non-IGA procedure are entitled to be represented or assisted by another employee of their choice, and grievants have selected BGC representatives to serve in that capacity without objection from PECO. Pet. App. A21-A23.

that "[b]y placing the name of IGA in its handbook and setting up IGA grievance procedures, [PECO] may be minimally encouraging membership in the IGA and discouraging membership in the BGC." The Board held, however, that "these factors, absent discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict employees from joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status." *Id.* at A43-A44. Finding no evidence that PECO had impermissibly discriminated against any of its employees, the Board concluded that PECO "has not interfered with the rights of any of its employees to join or support the BGC" (*id.* at A41).

3. The court of appeals set aside the Board's order and remanded the case for further proceedings. The court recognized that "because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO has no independent obligation to listen to or recognize the BGC for purposes of its members' grievances" (Pet. App. A8). It also recognized that "the agreement with the IGA to accord its members privileged treatment for grievance purposes [wa]s not, standing by itself, unlawful under the Act" (*ibid.*). However, relying on the ALJ's finding that " '[i]t is likely that [PECO's] treatment of IGA and the BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGG,' " the court concluded, contrary to the Board, that "PECO's privileged treatment of the IGA encourages membership in that group and discourages membership in other groups, including BGC" and that therefore "PECO has interfered with and coerced employee choice in self-organization and in forming, joining, or assisting a labor organization" (*id.* at A10).

Because it found that PECO's discriminatory treatment of the BGC constitutes a prima facie violation of Section 8(a)(1), the court remanded the case to the Board "for consideration of PECO's purported business justifications, and for an appropriate remedy if no business justification exists" (Pet. App. A12).[3] The court added that it was not suggesting that "the only appropriate remedies for PECO's conduct [would be] to either dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one. Rather, a grievance system which accords all employees, and not just members of a privileged group, the leverage of group representation for individual grievances will remove the unlawful coercion on employees to either join the privileged group or forego group representation for individual grievances." *Id.* at A12-A13.

4. Petitioners contend that this case raises the issue whether an employer must treat all minority unions equally (84-1641 Pet. i, 8-9) and more particularly, whether an employer may recognize one minority union for the purpose of processing grievances without according similar privileges to all other minority unions (84-1633 Pet. i, 12). However, the court of appeals did not hold that any preference accorded by an employer to one non-majority union over another violates Section 8(a)(1), or that an employer must always treat two or more non-majority unions equally in all respects. Rather, the court was careful to explain that it was deciding only whether, "under the facts of this case, PECO interfered with, restrained, or coerced its employees in organizing, forming, joining, or assisting the BGC" (Pet. App. A8). Although the court found, contrary to the Board, that PECO's preferential treatment of the IGA in respect to

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[3]The Board had previously found it unnecessary to pass on the business justifications proffered by PECO (Pet. App. A15 n.4).

grievance processing was a significant benefit which, absent a substantial business justification, would constitute impermissible interference with the employees' exercise of their Section 7 rights, this disagreement between the court and the Board raises essentially a fact-bound issue. This Court ordinarily does not review such issues. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, the court of appeals did not finally determine whether PECO's preferential treatment of IGA violated Section 8(a)(1) of the Act, but remanded the case for the Board to evaluate, in the first instance, PECO's business justifications. The court also indicated that, even if the Board ultimately rejected PECO's business justifications, it was not required to provide remedies that would require PECO either to "dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one" (Pet. App. A12-A13).

In light of the fact-specific nature of the court of appeals' decision and the interlocutory posture of the case, the Board decided not to file a petition in this case.[4]

Respectfully submitted.

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MAY 1985

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[4]Contrary to the contention of petitioner IGA (84-1641 Pet. 14-17), the decision below does not conflict with the decision in *NLRB* v. *Post Publishing Co.*, 311 F.2d 565 (7th Cir. 1962). There, the court held that an employer's contribution of profits from cafeteria and beverage vending machine sales to a union with which it had a contract did not constitute unlawful assistance and financial support of a labor organization under Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2). Nothing in that decision bears on the question whether the privileges granted to members of one non-majority group over members of another in their relationship with their employer impinges on the Section 7 rights of employees to be free of employer pressure in organizational activities.

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Nos. 84-1633 & 84-1641

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In The

# Supreme Court of the United States

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*v.*

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and INDEPENDENT GROUP ASSOCIATION,

*Respondents.*

AND

INDEPENDENT GROUP ASSOCIATION,
*Petitioner,*

*v.*

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and PHILADELPHIA ELECTRIC COMPANY,

*Respondents.*

*On Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## BRIEF IN OPPOSITION OF BLACK GRIEVANCE COMMITTEE TO PETITIONS FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION OF BLACK GRIEVANCE COMMITTEE TO PETITIONS FOR WRIT OF CERTIORARI

## COUNTER-STATEMENT OF THE CASE

Respondent Black Grievance Committee ("BGC") accepts most of the statement of the case presented by petitioners Philadelphia Electric Company ("PECO") and Independent Group Association ("IGA") with the exception of the argument supporting the petitions contained within their respective statements of the case. BGC, however, does wish to add a few points to clarify the record.

The BGC was formed seventeen years ago due to the perception by black employees at PECO that the IGA was not responsive to black employees' claims of racial discrimination and other problems affecting black workers (A25).* Since the IGA was not an exclusive bargaining representative, its members desiring to assert claims of racial discrimination could not force the IGA to handle their grievances or obtain greater attention to alleged discriminatory practices in the event that the IGA was reluctant to proceed (A9-10). The BGC thus arose to direct attention to alleged racially discriminatory practices which BGC members wished to have addressed within the grievance system established by PECO for the benefit of all its employees.

PECO did permit the BGC to represent its members in individual grievance proceedings for a period of ten years until September 12, 1978 when PECO reversed its earlier position and prohibited BGC from representing its membership in grievance proceedings concerning any issue (A23-24). Thus, for a period of ten years PECO permitted BGC members to have their freely

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* In citing to the documents in the Appendix, BGC will cite the Appendix submitted by PECO while noting that both Appendices contain the same documents though with different pagination.

chosen labor organization, BGC, represent their interests in individual grievance proceedings before it abruptly changed its position. Thereafter, employees, not members of IGA, or who chose not to be represented by IGA in grievance proceedings, could be represented by a single co-employee serving in a representative capacity merely as an interested friend and not as the representative of any group or labor organization.

PECO thus forced employees to choose between labor organization representation by IGA or individual employee representation without the assistance of any labor organization (A11).

After permitting BGC to represent its members for ten years, PECO justified its abrupt refusal to permit further BGC representation claiming that to do so would permit racial polarization of the work force where black and white groups would represent the interests of their respective members (A5, 23, 24). Though this rationale appears neutral on its face, since the IGA had an all white executive board and the sole right to represent employees as a labor organization, black employees desiring to assert claims which the IGA did not support were deprived of labor organization assistance by the favoritism given IGA and the ban on representation by BGC. BGC therefore argued that PECO committed an unfair labor practice violating Section 8(a)(1) of the National Labor Relations Act by refusing BGC permission to represent its members on the grounds of the race of the leadership and membership of BGC which had a nexus to interference with Section 7 rights. This claim founded on racial discrimination was asserted in addition to the claim under Section 8(a)(1) of interference with Section 7 rights through disparate treatment and favoritism and support for the IGA.

On the unique facts presented by this case, the Court of Appeals held that when an employer creates a grievance mechanism

and then accords one non-majority employee group privileged status over another non-majority group, encouraging membership in the former while discouraging it in the latter, it unlawfully interferes with the Section 7 rights of employees to band together for mutual assistance in the group of their free choice (A11). The court noted that otherwise employees would be forced, if they desired group leverage against their employer, to join employee groups favored by the employer despite the employees' belief that the favored group will not be supportive of their interests and cannot be legally forced to fairly represent their interests. *Id.*

PECO and IGA have filed petitions for a writ of certiorari from this decision, but the NLRB has chosen not to seek review of the Court of Appeals decision.

## ARGUMENT

### I.

**The unique factual circumstances of this case resulted in a decision, for which the NLRB does not seek review, that is consistent with prior decisions of the Supreme Court.**

Petitioners invite this Court to exercise its discretion to determine this case on the merits though myriad reasons exist for the Court to decline the invitation. First, the unique factual circumstances of this case suggest that the fact pattern is *sui generis*. Second, the NLRB has not chosen to seek review though it was the respondent below. Third, the NLRB did not give full consideration to the case prior to review by the Court of Appeals and issued a decision adopting the opinion of an Administrative Law Judge without independent analysis by the Board. Fourth, the decision of the Court of Appeals is consistent with the purposes of the NLRA and previous decisions of this Court. Fifth, petitioner PECO observes that the Third Circuit is "the first court of appeals

to confront the issue directly" (Petition for Certiorari at 12). Sixth, there are no decisions by the NLRB or other courts of appeals which are inconsistent on the precise issue presented concerning the respective rights of members of non-majority labor organizations in a grievance system created by the employer.

The uniqueness of this case lies in the fact that PECO permits a forty year old non-majority labor organization to represent its membership in an employer-created grievance system while not permitting a seventeen year old non-majority labor organization to represent its membership though it previously permitted the younger group the opportunity to represent its members for a period of ten years. The uncommon posture in which the issues are presented makes this case an undesirable vehicle for this Court to determine principles of labor law which have not been discussed by other circuits and which did not receive a full measure of discussion by the NLRB which would assist review by this Court.

The application by the Court of Appeals of Section 7 and Section 8(a)(1) of the NLRA to the unique facts of the case is consistent with prior decisions of this Court and is not inconsistent with the decisions of other circuits. Section 7 guarantees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activity for . . . mutual aid or protection. . . ." 29 U.S.C. §157. Section 8(a)(1) of the Act enforces the rights guaranteed by Section 7 by declaring it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 157. . . ." 29 U.S.C. §158(a)(1). Though BGC does not have Section 9(a) status as the exclusive bargaining representative, the actions of BGC members in banding together to present their grievances to PECO constitute concerted action protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Since BGC has never been recognized or certified as the exclusive bargaining representative, PECO has no independent obligation to permit BGC to represent members in grievance proceedings. *Morrisville Cotton Mills,* 2 NLRB 952, *modified and enforced,* 94 F.2d 61 (4th Cir. 1938). The members only agreement with IGA permitting representation in grievance proceedings is not, standing by itself, an unfair labor practice. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). However, when PECO grants members only recognition to IGA for grievance administration but denies and refuses to permit corresponding rights to BGC on behalf of its membership, PECO has engaged in disparate treatment tending to promote membership in IGA and inhibit membership in BGC. *Berkshire Knitting Mills*, 46 NLRB 955, *modified and enforced*, 139 F.2d 134 (3rd Cir. 1943), *cert. denied*, 322 U.S. 747 (1944); *Sunbeam Corporation,* 99 NLRB 546 (1952); *Carborundum Company,* 36 NLRB 710 (1941). Disparate treatment inhibiting Section 7 rights constitutes an unfair labor practice under Section 8(a)(1). *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979); *Trustees of Columbia University,* 225 NLRB 185 (1976).

Disparate treatment in the use of company bulletin boards may constitute unlawful interference. *Midwest Stock Exchange Inc. v. NLRB,* 635 F.2d 1255 (7th Cir. 1980); *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983). Restrictions on solicitation of employees for union purposes when other solicitation is permitted under similar circumstances may violate Section 8(a)(1). *Montgomery Ward and Co., Inc. v. NLRB*, 692 F.2d 1115 (7th Cir. 1982); *Midwest Stock Exchanger Inc. v. NLRB, supra.* Hospital rules preventing employee solicitation for union membership during non-working time in non-working areas constitutes interference with the right of self-organization protected by Section 7. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Company rules prohibiting employee wearing of union insignia

in the absence of special circumstances constitutes unlawful interference with Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814 (6th Cir. 1975).

The import of these disparate treatment cases is that an employer unlawfully interferes with Section 7 rights when it refuses to permit organizational and other activities of members of a labor organization when it permits other organizations or groups to conduct similar activities. Thus, petitioners are correct that, standing alone, an act utilizing economic weapons which may encourage or discourage union membership is not an unfair labor practice. *NLRB v. Brown*, 380 U.S. 278 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965). But here the discouragement of BGC membership comes in a factual circumstance where the employer has voluntarily established a grievance system and permitted one non-majority labor organization the exclusive right to represent its members in the grievance system while denying the right of representation to another non-majority labor organization. It is thus the disparate treatment of employees engaging in protected concerted activities together with the resulting encouragement and discouragement of membership in the two labor organizations which lies at the heart of this case. Coupled with this disparate treatment is the coercion and interference with employees' right to free choice of their labor organization through the employer's grant of the exclusive right to represent members in grievance proceedings to the favored IGA. This coercion of selection of labor organizations for employees desiring group representation in the grievance system, exists while the employee has no right to compel the non-majority IGA to fairly represent the employee's interests. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 64 (1975); *Vaca v. Sipes,* 386 U.S. 171 (1967).

Petitioners have misstated the clearly limited holding of this case dependent upon its unique facts by claiming that the Court of Appeals decided that employers must deal equally and identically with every non-majority labor organization. The limited holding of the Court of Appeals depends upon the employer's creation of a grievance system where employees cannot claim a legal duty of fair representation and where the employer grants an exclusive right to represent members to only one non-certified labor organization.

Due to the unique factual circumstance of this case, the decision of the Court of Appeals will not impact upon the experimentation with alternative forms of employee organizing and representation as suggested by petitioners. In any event, if petitioners are correct that many new forms of labor organizations and modes of employee representation are coming into existence, the adjustment of the respective rights of employees in the variety of labor organizations contemplated should not be determined by this Court prior to any review by the NLRB of these new forms of employee representation and where no other court of appeals has considered the myriad issues created by a host of yet undefined alternative modes of self-organization and employee representation.

Further, since the NLRB chose neither to file a Petition for Writ of Certiorari nor to issue its own decision on this case, but rather, chose to adopt the decision of an Administrative Law Judge, it is clear that this case does not present the type of case in which this Court should attempt to determine the rights of employees without an exclusive bargaining representative where they have formed together to seek mutual aid and protection of their interests through concerted action under Section 7 but where the employer engages in differential treatment of the budding labor organizations.

In the posture of this case, this Court should decline the invitation to finally determine principles of federal labor law without prior full consideration by the NLRB and the various courts of appeals.

## II.

**The Court of Appeals applied the well established principle that NLRB legal conclusions are not entitled to the usual deference when they rely upon an erroneous legal foundation.**

Both petitioners seek review of the Court of Appeals decision claiming that it applied an impermissible standard of review of NLRB legal conclusions. Though petitioners cite a number of cases applying different formulations of the standard of review applicable in different circumstances, the Court of Appeals in the instant case applied a very traditional and well established principle by not according the legal conclusions of the NLRB their usual deference since they were inconsistent with the Act and rested upon an erroneous legal foundation. *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980); *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979); *NLRB v. Brown*, 380 U.S. 278, 292 (1965); *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956).

Though the initial language by the Court of Appeals in applying the appropriate legal standards may suggest that the court was adopting a broader scope of review (A6), analysis of the entire decision of the court demonstrates that it merely applied the traditional erroneous legal foundation standard in reversing a decision of the NLRB. The Board silently adopted the legal analysis of the Administrative Law Judge who interpreted the effect of Section 7 and Section 8(a)(1) of the Act in a manner inconsistent with decisions of the courts and the Board itself. Specifically, the Administrative Law Judge held that Section 7 rights were limited to situations involving a restraint upon "employees from

joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status" (A44). The Court of Appeals held that the Administrative Law Judge "erred in not recognizing that the protection of Section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity" (A9). The court held that reading of the rights protected by Section 7 and enforced through Section 8(a)(1) was too narrow and frustrated fundamental principles of the Act permitting employees to band together to address specific grievances even when they do not seek Section 9(a) exclusive bargaining status (A10).

The court therefore held that the NLRB decision was premised upon an erroneous legal foundation not supported by decisions of the Board or the courts. When an NLRB decision is premised upon an erroneous legal foundation, the cases previously cited require withdrawal of the usual deference accorded the Board's interpretation of the NLRA due to the inconsistency of its position with the Act.

Since the standard of review applied by the court follows this traditional standard of review, there is no reason for this Court to review the application of this well established principle.

## CONCLUSION

For the above and foregoing reasons, the Court should deny the petitions for writ of certiorari filed in both of these cases.

Respectfully submitted,

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*Attorney for Respondent*
*Black Grievance Committee*